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AMERICAN BAR ASSOCIATION

JOVRNAL

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VOL. XX DECEMBER, 1934 NO. 12

State and Municipal Liability in Tort—Proposed Statutory Reform

BY EDWIN M. BORCHARD

California Unifies Enforcement Agencies to Fight Crime

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BY RICHARD W. FLOURNOY

Statutory Classification

BY THOMAS S. DABAGH

Standing and Special Committees, 1934-35

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CURRENT LEGISLATION—CURRENT LEGAL LITERATURE—STATE BAR NEWS



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AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. XX DECEMBER, 1934 NO. 12

CVRRENT EVENTS

President Loftin Announces Membership of Important New Special Committee

PRESIDENT LOFTIN on Nov. 4 announced the personnel of the recently created Special Committee to Study Federal Legislation and Policies as Affecting the Rights and Liberties of American Citizens.

This Committee was created by the Executive Committee of the American Bar Association pursuant to a resolution passed at the Annual Meeting at Milwaukee. In announcing the appointments, President Loftin said:

"Pursuant to authority vested in me by the Executive Committee, I have designated the Committee as 'Special Committee to Study Federal Legislation and Policies as Affecting the Rights and Liberties of American Citizens,' and fixed the number of the Committee at seven.

"I have endeavored to find able outstanding lawyers, without regard to their political affiliations, to serve on this Committee, in whom both the Bar and the public have confidence; who have not publicly expressed themselves on the questions to be considered, and who will proceed in a calm, dispassionate and competent manner to their study and report.

"I have been fortunate in securing the consent of outstanding members of the Bar, who are willing to give their time to this work, and it is with satisfaction that I announce the personnel of the Committee as follows:

"Clarence E. Martin of Martinsburg, West Virginia, President of the American Bar Association in 1932-1933, Chairman; William D. Mitchell of New York City, former Solicitor General and later Attorney General of the United States; George Wharton Pepper of Philadelphia, former United States Senator from Pennsylvania; George L. Buist of Charleston, South Carolina, member of the General Council of the Association from that state, and author of the resolution calling for the appointment of this committee; Chas. P. Taft, II, of Cincinnati, son of ex-President Taft and leader in the Cincinnati Reform Movement; Dr. John D. Clark of Cheyenne, Wyoming, lawyer, economist and university professor; and Owen D. Young of New York City, lawyer and industrialist."

The resolution calling for the creation of the Special Committee was passed by the Association on August 31, on recommendation of the Executive Committee, and reads as follows:

"Whereas, the rapid development in recent months of novel legislative and governmental trends in the Federal Government, affecting the rights and liberties of American citizens and our constitutional form of government, has resulted in a great diversity of opinion throughout the United States as to the effect of these theories, and the questions involved hold a deep and peculiar interest for the bar of this country;

"And Whereas, the people of this country, at all such times, look to the bar for advice and guidance in such a crisis;

"Now, Therefore, Be It Resolved:

"That the General Council recommends that the Executive Committee create a special committee to study the effect of recent developments in national legislation and governmental policies, as affecting the rights and liberties of American citizens and the maintenance of the guarantees furnished by the United States Constitution; and that such committee report its findings to the Executive Committee, and that the Executive Committee report the same, together with its comments thereon, at the next meeting of the American Bar Association."

The Special Committee's report will certainly be one of the most important documents to be submitted to the next Annual Meeting.

St. Louis Bar Association Takes Unusual Step to Uphold Law

THE St. Louis Bar Asociation recently took the unusual step of offering a reward for the arrest and conviction of certain persons guilty of assault on the Prosecuting Attorney of St. Louis County. We are indebted to Mr.

Kenneth Teasdale, President of that Association, for the following details:

"On October 9, 1934, Hon. Arthur C. Anderson, Prosecuting Attorney of St. Louis County, reported that while driving home about 2 A. M., after conferring with witnesses for the prosecution in a pending kidnaping case, he was intentionally forced off the road by another machine occupied by three unidentified men, his car striking a telephone pole. He suffered a fractured leg and severe cuts and bruises.

"Upon receipt of this information the Executive Committee of the St. Louis Bar Association passed a resolution authorizing the appointment of a special committee, as follows, to investigate this assault: Former Circuit Judge Arthur V. Lashly of St. Louis County; Arthur J. Freund, former Police Commissioner of St. Louis; Daniel Bartlett, former Police Commissioner of St. Louis.

"This committee, after its investigation, reported to our Executive Committee that Anderson was the victim of 'a deliberate and premeditated attack.' The Executive Committee received the special committee's report with approval and concluded to call on the State and national authorities, as well as the law enforcement agencies of the City and County of St. Louis, for 'prompt and aggressive action' to punish Anderson's assailants. U. S. Attorney General Cummings felt that the Department of Justice could not enter the investigation because the facts in the case did not indicate that there was any violation of Federal statutes. We also called upon the Governor, Attorney General of Missouri, Circuit Attorney of St. Louis, and the Metropolitan Police of St. Louis, all of whom pledged every aid and assistance.

"The Executive Committee also adopted a resolution calling on members of the Association to contribute to a 'reward fund.' Non-members' contributions were also welcomed. As the matter now stands, we have posted a reward of $2850 for information leading to the arrest and conviction of the person or persons implicated in the assault."

American Bar Association's Delegation to Washington Crime Conference

THE American Bar Association will be officially represented at the Crime Conference to be held in Washington, Dec. 10-13, by a delegation of seventeen members, headed by Hon. Scott M. Loftin, President of the Association. The delegation was named by President Loftin in response to a communication from Attorney General Cummings inviting the Association to participate in the Conference. The members are as follows:

Hon. Earle W. Evans, Wichita, Kansas, immediate past President.

Hon. Clarence E. Martin, Martinsburg, W. Va., former President, Chairman of the Special Committee appointed to cooperate in the holding of the Crime Conference, and the following members of that Special Committee: Philip J. Wickser, Buffalo, N. Y.; Will Shafroth, Chicago, Ill.; Joseph F. O'Connell, Boston, Mass.; Dean Albert J. Harno, University of Illinois.

Rollin M. Perkins, Iowa City, Ia., Vice-Chairman of the Section on Criminal Law; Henry W. Toll, Denver, Col., Secretary of the Section on Criminal Law, and the following members of the Council of the Section: Oscar Hallam, St. Paul, Minn.; George A. Bowman, Milwaukee, Wis.; Louis S. Cohane, Detroit, Mich.; J. Weston Allen, Boston, Mass.; James J. Robinson, Bloomington, Ind.

Charles E. Clark, Dean of Yale Law School, New Haven, Conn.; William Draper Lewis, Director of American Law Institute, Philadelphia, Pa.; Floyd E. Thompson, Chairman of Association's Committee on Code of Criminal Procedure, Chicago, Ill.

California Acts on Constitutional Amendments Providing for Appointment of Judges, State Department of Justice, and Criminal Procedure Changes

FOUR constitutional amendments, widely advertised as initiative proposals to curb crime, were voted on by the people of California at the recent election in that state. The first of these, which was presented to the electorate under the title "Selection of Judges and Confirmation by Vote of the People" probably passed by a close margin, but the official figures were not available when the JOURNAL went to press.

The other three amendments, one providing for the coordination of all law enforcement agencies under the direction of the Attorney General, similar in its main features to the recommendation recently passed by the American Bar Association, another permitting comment on the evidence by the court and giving both court and prosecutor the right to comment on the defendant's failure to testify, and a third allowing a plea of guilty before the committing magistrate, were all passed by very large majorities up to almost two to one.

A further amendment, giving the people of Los Angeles County the right to vote on a slightly different proposal in regard to the selection of their superior court judges seems to have been defeated.

The amendment relating to judicial selection applies automatically to the seven justices of the Supreme Court and the eighteen judges of the District Courts of Appeals, and it may be made to apply to the Superior Court judges in any county by the vote of the people of that county. It provides that whenever a vacancy occurs, the Governor shall have power to appoint to the office, subject to confirmation by a board, consisting of the Chief Justice of the Supreme Court, the Presiding Justice of the District Court of Appeals for the district in which the vacancy occurs, (the Presiding Justice who has served longest as such upon any of the District Courts of Appeal in case of the appointment of a Justice of the Supreme Court) and the Attorney General. Such appointee then serves until the next general election, when his name appears without opposition on the ballot and the question is presented to the voters "Shall Judge———be elected to the office for the term expiring ———." They may vote "yes" or "no." If the majority of those voting, vote "yes" the judge enters upon the same term of office as at present, but if the majority vote "no" there is a vacancy to be filled by appointment in the way which has been stated. Any judge holding a position affected by the amendment or any judge hereafter elected to fill such a position may, at the end of his term of office, become a candidate to succeed himself. Otherwise, the Governor nominates the candidate subject to confirmation by the board and his name appears on the ballot in the same manner as though he had been previously appointed or elected, and was running against his record for reelection. As a result of the passage of this amendment, the so-called Commonwealth Plan which has been discussed for a number of years, will now have a definite trial.

The amendment bringing the law enforcement agencies of the state under the direct supervision of the Attorney General, is discussed in an article in this issue by Judge W. A. Beasley, who was active in securing its adoption, and will not be further commented on here.

Amendment No. 5, consists of two parts, the first of which permits the judge or the district attorney to comment to the jury upon the fact that a defendant in a criminal case fails to

take the witness stand in his own defense, and the second of which permits the judge to comment on the evidence at the close of the trial. The first of these provisions is included in the Criminal Law Recommendations passed by the American Bar Association at Milwaukee, and the second provision is one contained in the American Law Institute Code (Sec. 325). The other amendment which was passed permits a defendant charged with the commission of a felony to plead guilty before the committing magistrate. This provides a much more expeditious method of handling cases where the accused desires to enter a plea of guilty.

The election returns further showed that in Los Angeles County 17 out of the 18 judges endorsed by the Los Angeles Bar Association were elected. The text of the amendment in reference to the method of choosing judges is as follows:

"Sec. 26. Within thirty days before the sixteenth day of August next preceding the expiration of his term, any justice of the Supreme Court, justice of a District Court of Appeal, or judge of a superior court in any county the electors of which have adopted provisions of this section as applicable to the judge or judges of the superior court of such county in the manner hereinafter provided, may file with the officer charged with the duty of certifying nominations for publication in the official ballot a declaration of candidacy for election to succeed himself. If he does not file such declaration the Governor must nominate a suitable person for the office before the sixteenth day of September, by filing such nomination with the officer charged with said duty of certifying nominations.

"In either event, the name of such candidate shall be placed upon the ballot for the ensuing general election in November in substantially the following form:

.....

For .....
(title of office)

Shall ..... (name) (Yes) / (No)

be elected to the office for the term expiring January .....? (year)

.....

"No name shall be placed upon the ballot as a candidate for any of said judicial offices except that of a person so declaring or so nominated. If a majority of the electors voting upon such candidacy vote 'yes,' such person shall be elected to said office. If a majority of those voting thereon vote 'no,' he shall not be elected, and may not thereafter be appointed to fill any vacancy in that court, but may be nominated and elected thereto as hereinbefore provided.

"Whenever a vacancy shall occur in any judicial office above named, by reason of the failure of a candidate to be elected or otherwise, the Governor shall appoint a suitable person to fill the vacancy. An incumbent of any such judicial office serving a term by appointment of the Governor shall hold office until the first Monday after the first day of January following the general election next after his appointment, or until the qualification of any nominee who may have been elected to said office prior to that time.

"No such nomination or appointment by the Governor shall be effective unless there be filed with the Secretary of State a written confirmation of such nomination or appointment signed by a majority of the three officials herein designated as the commission on qualifications. The commission on qualifications shall consist of (1) the Chief Justice of the Supreme Court, or, if, such office be vacant, the acting Chief Justice; (2) the presiding justice of the District Court of Appeal of the district in which a justice of a District Court of Appeal or a judge of a superior court is to serve, or, if there be two such presiding justices, the one who has served the longer as such; or, in the case of the nomination or appointment of a justice of the Supreme Court, the presiding justice who has served longest as such upon any of the District Courts of Appeal—and (3) the Attorney General. If two or more presiding justices above designated shall have served terms of equal length, they shall choose the one who is to be a member of the commission on qualifications by lot, whenever occasion for action arises. The Legislature shall provide by general law for the retirement, with reasonable retirement allowance, of such justices and judges for age or disability.

"In addition to the methods of removal by the Legislature provided by sections 17 and 18 of Article IV and by section 10 of this article, the provisions of Article XXIII relative to the recall of elective public officers shall be applicable to justices and judges elected and appointed pursuant to the provisions of this section so far as the same relate to the removal from office.

"The provisions of this section shall not apply to the judge or judges of the superior court of any county until a majority of the electors of such county voting on the question of the adoption of such provisions, in a manner to be provided for by the Legislature shall vote in favor thereof.

"If the Legislature diminishes the number of judges of the superior court in any county or city and county, the offices which first become vacant, to the number of judges diminished, shall be deemed to be abolished."

Carnegie Corporation Makes Grant to Support Coordination Program

THE Carnegie Corporation of New York has recently announced a grant of fifty thousand dollars to the American Bar Association for the support of its coordination program, over a three year period. This action was taken as a result of an application filed on the authority of the Executive Committee of the Association, following the meeting of that committee last May. At that time the Committee went on record as pledging itself "to the policy of continued activity and support in behalf of the National Bar Program on a three year basis for the future, as recommended by the Committee on Coordination, the program to be determined each year at the time of the annual meeting of the Association" and it further resolved that it "is prepared to contribute towards adequate budgetary support of such a program." This motion resulted from the cooperation given the National Bar Program by state and local associations over the country.

With this additional financial assistance, the Coordination Plan will be greatly strengthened and the assurance of a three year program will give opportunity for making more permanent the ties between local, state and national associations.

Remaining Addresses in Radio Series

FOLLOWING are the remaining addresses in the American Bar Association's Radio Series. They will be given on Saturdays at 7:45-8:00 p. m. Eastern Standard Time over a nationwide network of the Columbia Broadcasting System.

Dec. 1. "Shall We Abandon Ship? A Discussion Concerning the Constitution and Present Governmental Trends." James M. Beck, former Solicitor General of the United States.

Dec. 8. "Selecting Our Judges." Paul V. McNutt, Governor of Indiana.

Dec. 15. "Needed Reforms in Criminal Procedure." Roscoe Pound, Dean of Harvard Law School.

Dec. 22. "Fundamental Aspects of the New Deal from a Lawyer's Point of View." John W. Davis, former Solicitor General of the United States.

In addition to the addresses above mentioned, an additional program has been scheduled for the same time on Saturday night, December 29th. Dean Emeritus John H. Wigmore, of the Northwestern University Law School, who is also Secretary of the Scientific Crime Detection Laboratory, will discuss with Leonarde Keeler, psychologist of that laboratory and authority on the lie detector, the subject of "Modern Methods of Crime Detection."

Executive Committee to Hold Mid-Winter Meeting at Jacksonville, Fla.

The Executive Committee of the American Bar Association has accepted the invitation of the Florida lawyers to hold its regular mid-winter meeting at Jacksonville. The meeting will begin on January 29 and continue for three days.

The Executive Committee has also received an invitation to attend the meeting of the Florida State Bar Association, which will convene at St. Augustine immediately following the meeting of the Executive Committee in Jacksonville. An interesting program has been arranged.

Similar invitations have been extended to the members of the Executive Committee of the Conference of Commissioners on Uniform State Laws. It will hold its meeting at Jacksonville at the time of the meeting of the Executive Committee of the Association.

Senator Long's Louisiana Bar Act

AN act of the Louisiana Legislature passed at the recent much publicized special session makes all the lawyers of that State members of a public corporation, by name, the State Bar of Louisiana. In most respects the act is like those in force in a number of states, but the differences are important. The bar board is given all the powers, rather than the State Bar itself. The board is composed of one member from each of the eight congressional districts and the members are to be elected at general elections, the first group being appointed by the governor. A candidate for this office must file a sworn statement "disclosing the names of private corporations, if any, for which the said candidate has been attorney, with emoluments received, for a period of five years previous to date of such declaration of intention." The first board will organize the State Bar.

The board of governors will receive all complaints against members and exercise the usual powers in respect to investigations. Its recommendations thereon are to be passed to "the legally constituted disbarment authorities." The board is empowered to "formulate rules of professional conduct . . ." It will choose its officers from its own membership.

The act aims particularly to make admission to practice an easy matter. As to general education the applicant need have only "a high school course or its equivalent." There is to be no admission on diploma; candidates who have not graduated from an "approved law school" shall "prove a course of study under the supervision of a reputable Louisiana lawyer for a period of not less than three years." Otherwise the board is fully in control of examination and admission.

The annual dues for members will be three dollars, and for inactive members two dollars. The board has power to suspend active members only on the ground of non-payment of dues. An organization meeting is to be held in Baton Rouge within thirty days after the taking effect of this act.

Cincinnati Bar Holds Conference on Judicial Selection

ON Saturday, October 20th, an all day conference was held in Cincinnati on "The Selection and Tenure of Judges in Ohio." This discussion was organized by the Cincinnati Bar Association, under the auspices of the Ohio State Bar Association.

Professor Edson Sunderland, of the University of Michigan, was asked to outline this subject, which he did by dividing it into ten separate divisions, each of which was discussed separately during the course of the day. He also made up a questionnaire which was circulated at the meeting.

The Committee in Charge, headed by Dean Merton L. Ferson, of the Cincinnati Law School, arranged the conference because the members considered it the most effective type of meeting for dealing with the subject, since in such a gathering it is possible for the members to draw out each other and clarify the points made. The aim was to make the discussion coherent and end it with a summary of the ideas expressed. The introductory remarks were made by Professor Sunderland, and the conference ended with a summary by Mr. Newton D. Baker.

The President of the Cincinnati Bar Association, Mr. Froome Morris, introduced the presiding officer, Judge John Weld Peck. The other speakers on the program were: Judge Robert N. Wilkin, of the Supreme Court of Ohio; Mr. Murray Seasongood, former Mayor of Cincinnati; Mr. Eli Speidel, of Batavia, Ohio; Mr. Robert A. Taft; Dean Charles Racine, of the University of Toledo Law School, President of the Toledo Bar Association; Mr. James L. Magrish; Mr. Joseph O'Meara; Professor Silas Harris, of the College of Law of Ohio State University; Judge Walter M. Shohl; Mr. Milton Schmidt; Professor William Dawson, of the College of Law of Western Reserve University; Mr. Robert Guinther, formerly President of the Ohio State Bar Association; Mr. Joseph Grayson; Mr. Henry A. Gardner, President of the Chicago Bar Association; Judge Chester R. Shook; Mr. Howard L. Barkdull, of Cleveland; Mr. Morison R. Waite; Mr. Charles P. Megan, of Chicago, and Mr. Oliver G. Bailey. Where not otherwise noted, the speakers were from Cincinnati.

A verbatim report of this very able and interesting discussion is being published in the current issue of the Cincinnati Law Review and will be available, without charge, on request to American Bar Association headquarters.

Committee on Unauthorized Practice to Issue Monthly Bulletin

THE American Bar Association Committee on Unauthorized Practice met in Chicago on November 18 and 19 and decided to send out to all members of Unauthorized Practice Committees whose names are on file at the Association headquarters a monthly bulletin setting forth recent developments in various parts of the country on this subject, and giving a digest of current decisions regarding it. The first issue will be off the press the first part of December.

The Bulletin will also be sent without charge to anyone requesting it.

Deaths of Members Reported to Headquarters

HON. FREDERIC R. DE YOUNG, Associate Justice of the Illinois Supreme Court, died in Chicago, on Nov. 16. Justice De Young had served ten years on the Supreme Court, of which he was at one time Chief Justice, and had written opinions in some of the most important cases coming before that body. He was an outstanding figure in the movement for the improvement of the administration of Justice in Illinois and carried this attitude into his service on the bench.

Previous to his election to the Supreme Court, Judge De Young served on the Circuit bench, by appointment of Governor Lowden, and on the Superior Court, to which he was elected. As a judge and lawyer he was noted for his prodigious capacity for hard work and intense application. Before his judicial career began, he had served in the General Assembly, where he became Chairman of the Judiciary Committee, and as

a member of the Illinois Constitutional Convention, where his ability was recognized by his selection as head of the important committee which had to do with the reorganization of the courts.

Charles L. Sturtevant, Washington, D. C., Sept. 30.

W. S. Hunt, Houston, Texas, Sept. 12.

William S. Dalzell, Pittsburgh, Pa., Sept. 27.

Herbert Noble, New York City, Sept. 17.

Waldo G. Morse, New York City, Sept. 16.

John Purdon, Palisade, N. J., Sept. 26.

Arthur J. Selfridge, Boston, Mass., Sept. 28.

Hiram M. Burton, Boston, Mass., Sept. 13.

E. Wright Taylor, Cocoa, Fla., Sept. 9.

Hon. Richard T. Higgins, Hartford, Conn., Sept. 16.

John E. Sanders, Phoenix, Arizona, Sept. 8.

A. Bertram Samuels, New York City, Sept. 3.

John J. Robinson, New York City, Sept. 3.

Entire Supreme Court Disqualified

THE extraordinary case of an entire State Supreme Court being disqualified in an important case and of a Special Supreme Court being appointed to hear and decide it, is furnished by South Carolina. The proceeding was one involving the constitutionality of a recent Act of the Legislature reducing the salaries of judges and was brought by Judge Grimball of Charleston against A. J. Beattie, Comptroller General, and Eustace P. Miller, State Treasurer. It was brought by a petition for mandamus under the original jurisdiction of the State Supreme Court.

Additional interest is lent to the case by the fact that all five of the special Supreme Court Justices are former Presidents of the South Carolina Bar Association, viz: Thomas F. McDow of New York, John I. Cosgrove of Charleston, T. Frank Watkins of Anderson, Alva M. Lumpkin of Columbia and William S. Nelson of Columbia.

The case was heard early in November.

New Concordat Between Cleveland Bar Association and Banks

THE Cleveland Bar Association and the Trust Departments of the banks of Cleveland, O., have joined in a Declaration of Principles governing the practice of law and as a consequence the suit recently filed against them by a Committee of the Bar Association has been dismissed. It will be recalled that an agreement was entered into several years ago by the Association and various Cleveland Banks, but the present committee held that it had not availed to stop the practices aimed at and entered suit accordingly. The agreement does not include "revocable agency and trust instruments for sole benefit of the makers thereof." A standing committee of six members is to be appointed—three by the Bar Association and three by the signatory banks—for the purpose of meeting from time to time and discussing alleged violations "of the letter and spirit of this Code, and reporting to their respective organizations concerning the same."

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A. A. A.
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Kingman Brewster, James S. Y. Ivins and Percy W. Phillips

A complete work in one volume giving, for the first time, a thorough discussion of taxes under the A. A. A., including processing and compensation taxes, floor taxes, import taxes, etc., etc.

The authors of this work are nationally known lawyers specializing in tax matters. Mr. Brewster was formerly chairman of the Committee on Appeals and Review of the Bureau of Internal Revenue, and co-author of Holmes & Brewster's Federal Tax Appeals. Mr. Ivins was formerly Deputy Tax Commissioner of the State of New York, member of the U. S. Board of Tax Appeals,, and co-author of Holmes & Brewster Federal Tax Appeals. Mr. Phillips was formerly a member of the U. S. Board of Tax Appeals and is co-author of The Federal Gift Tax.

Can You Answer These Questions?

1. To what commodities, respectively, do the "processing tax" and the "compensating tax" apply?

2. What is the difference between a "processing tax" and a "compensating tax"?

3. Are the processing tax, the compensating tax, the floor tax, each constitutional? Is the floor tax an excise or direct tax?

4. Who determines the rate of tax on a given commodity? When and how is it determined?

5. To whom and when are processing taxes and compensating taxes on imports payable?

6. How often must returns be filed?

7. When are taxes based upon "excessive shifts in consumption"?

8. How is the "equivalent unit" of a "competing commodity" determined?

9. Under what conditions do vendees become liable for taxes under the Agricultural Adjustment Act?

10. What penalties are imposed for failure to file proper returns and to pay the tax?

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STATE AND MUNICIPAL LIABILITY IN TORT—PROPOSED STATUTORY REFORM

The Doctrine of Sovereign Irresponsibility, Lifted to a Point Never Reached in England, Has Long Stood Stubbornly in the Way of Statutory Reform on This Subject—Judicial Door to Community Liability First Opened through Instrumentality of Municipal Corporation — Use Made of Distinction Between "Proprietary" and "Corporate" Functions—Tentative Measure Designed to Distribute Risks of Public Administration More Fairly, without Overburdening Public Treasury, etc.

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HAD the advice of George Mason of Virginia been taken by the Constitutional Convention in 1787 and thus had there been written into the original Constitution a provision prohibiting a citizen of one state from suing another state in the federal courts, the history of public tort liability in the United States might have been radically different. The Supreme Court in *Chisholm v. Georgia* (1793), giving Art. III a literal interpretation, held such a suit possible, discountenancing for America the doctrines of sovereign immunity from suit and liability which English law had consecrated. It was not a politically wise decision, as Hamilton, Marshall and Madison had foreseen. For with the overthrow of the court's conclusion through the Eleventh Amendment by states in fear of judicial compulsion to pay their debts, it was perhaps inevitable that the inference should have been drawn that the reasoning of the Court on the substantive law of state responsibility had also been disavowed. At all events, American legal thought on the subject experienced a reaction from which it has not yet fully recovered. Monarchical doctrines of Kings who can do no wrong and sovereigns above the law were developed and inflated in the United States to a point never reached in England, in which they had their roots, and never even deemed worthy of serious consideration in the feudal continent so often and so erroneously deemed the source of governmental irresponsibility. It was left for the democratic United States to furnish the rationalizations and unconvincing explanations which gave a misunderstood major premise the false appearance of a reasoned and logical conclusion.

But however unjustified the premise of sovereign irresponsibility, it has stood rather stubbornly, even if not impregnably, in the way of statutory reform designed to overcome the injustice of these superannuated judicial doctrines. And it has made more difficult the effort to persuade legislatures to open the door to suit and liability, because the doctrine had by dint of iteration and reiteration acquired something of the sacred character of articles of faith. But the demands of modern life, the unprecedented expansion in governmental activities, the desire of legislatures to escape the burden of political claims, the insistence of occasional judges and many writers[1] that the ancient maxims were productive of unnecessary injustice, has finally brought a change in the climate of opinion, so that legislatures are now more willing to modify ancient rules of law in conformity with the requirements of good administration and of a more equitable distribution of social risks. Perhaps in assigning causes for the change in point of view, we should not overlook that modern juggernaut, instrument both of pleasure and destruction, the automobile, just as we owe to the convivial drink, penalized by legislation, the resurrection of the constitutional freedom from unreasonable searches and seizures.

Anglo-American law had long professed to ease its conscience by according the individual injured through the operation of governmental instrumentalities an action against the wrongdoing officer and, under a decentralized system of administration, by permitting suit against certain incorporated subdivisions of the state when acting in their "proprietary" or "corporate", as distinguished from their supposed "governmental" capacity. This recourse constituted a half-hearted recognition of the validity of the victim's claim, but at best an unsatisfactory method of discharging it. So far as concerns the officer's pecuniary liability, it was generally a spurious remedy for the victim, while yet an intolerable burden on the officer, who had to bear the costs of defending suits. We had not even developed the unwritten British practice by which the Crown undertakes to defend suits against excusable officers and to pay any resulting judgments. Injustice and inefficiency in public administration characterized the American system. The hapless victim of official wrongdoing was in practice left to bear the burden of a defective, negligent, perverse or erroneous administration of public functions, the costs of which in many cases should have been spread over the community as a whole; the officer was exposed to the risk of having lay juries overrule his expert judgment ordering the destruction of alleged nuisances and was subjected to damage suits altogether disproportionate to his emoluments and moral responsibility; the community, while ostensibly escaping liability for official torts, exposed itself to political claims, pursued by political rather than legal methods, had to submit to the opprobrium of denunciation as tyrranical and dishonest, and in some communities was hard put to it to find appropriate officers willing to assume unlimited risks.

The judicial door to community liability was first opened through the instrumentality of the municipal corporation. Partly because of the more limited size of the entity, partly because of the fact of incorporation, partly because of the more commercial nature of

some of its enterprises, the halo of sovereignty proved vulnerable to juristic persuasion and theories were found upon which to assert community liability for functions deemed "proprietary" or "corporate." Let us not be unduly disrespectful of the doctrinal — and perhaps practical—distinction between "governmental" and "corporate" functions, for it has an ancient lineage running back to the glossators and since the Renaissance has served on the continent to break down the armor of the legally irresponsible State. It might have done so even sooner but for the long survival of the doctrine of the free will and the accompanying postulate that the inanimate corporation could be guilty neither of tort nor crime.

But ultimately outworn legal doctrine, if necessary with the aid of legislation, gives way before the exigencies of modern life and public opinion. The barriers to community liability were gradually lowered. Then began in the United States the embarrassing effort to distinguish the functions which were corporate from those which were governmental, although unfortunately this effort was for historical reasons restricted to the incorporated municipality and did not extend to the county, even after incorporation, or to the state. While there seems to have been little difficulty in classifying profit-making or remunerative enterprises like railroads and transportation systems, gas, electric and water services as corporate, there has been a disposition to consider police, fire, health and education as governmental in character and free from tort liability. It might have been better for the courts had they simply made the arbitrary classification and declined to supply supporting reasons. Like the doctrine of unconstitutional conditions, the alleged reasons helped to break down rather than sustain the rule. Apart from the argument derived from the sovereign immunity of the city as agent of the state, the immunity has been placed on the ground that the city derives no pecuniary profit from the exercise of the function, such as education; that in the performance of public governmental duties the officers are agents of the state and not of the city—although they may be paid by the city—and that hence the doctrine of *respondeat superior* does not apply; that cities cannot properly perform their functions if they are made liable for the torts of their employees; that the function was imposed by requirement of the legislature and was not voluntarily assumed by the city; that mistakes in planning are discretionary or legislative, and that only execution is corporate; that powers exercised for the benefit of the public at large, like fire or police protection, are governmental, whereas those conferred for its own benefit or by reason of its nature as a city are corporate.

As these formulae began to be repeated and applied their inadequacy as criteria and justifications became more generally apparent, even to the courts that employed them. Benefit to the tort-feasor is no criterion of tort-liability; the status of agency is not normally determined by the character of the service or function but by the control exerted by the principal; it is an unfounded assumption, refuted by numberless decisions and increasing legislation, that public functions cannot be performed unless there is immunity from pecuniary responsibility; there is no sound distinction between duties voluntarily assumed and those imposed by law nor any justification for a difference in liability, even if the distinction were sound; there is no substantial foundation for the supposed distinction between acts beneficial to the public at large and those beneficial to the city or local community alone. This last conclusion could hardly be more convincingly demonstrated than by decisions holding that the building or operation of a drawbridge, the maintenance of a city hall and other municipal buildings, driving an ambulance, maintaining a city hospital, are for the general benefit of the public at large, whereas cleaning the streets, constructing sewers, maintaining a city prison, or driving an ash cart, are for the local benefit.

The fact is that the alleged justifications for immunity have served other courts as justifications for liability, indicating the futility of these explanations as guiding principles. Nor, except for the accidental divagations of history, can any sound reason be adduced for the fundamental difference in legal principle, as Chief Justice Jay pointed out in 1793, between a suit against the 40,000 citizens of Philadelphia and one against the 50,000 citizens of Delaware. Nor can one justify on rational grounds the primarily British distinction between acts of omission and commission, between nonfeasance and misfeasance. Nor the argument that in the performance of "governmental" functions the illegal or unlawful acts of officers are *ultra vires* or that the doctrine of *respondeat superior* does not apply.

Most of the courts, bound by precedent in their own states, have felt obliged to maintain the alleged distinction between "governmental" and "corporate" acts and have been at pains to classify torts and liability on this basis, while also maintaining the distinction between city and county or state liability. Some curious anomalies have resulted, which have added at least to the gayety of the nation, if not of the victim.

1. The literature of the subject, which for the most part is critical of the existing rules of law in general or in particular states, will be found in the following books and articles. There also, especially in the writer's and Prof. Tooke's articles, will be found an analytical discussion of the cases referred to in this paper.

Aks, Municipal Corporations—Tort Liability, 14 Corn. L. Q. 355 (1929);

Albertsworth, New Interests in the Law of Torts, 10 Calif. L. Rev. 461, at 480 (1922);

Angell, Sovereign Immunity—The Modern Trend, 35 Yale L. J. 150 (1925);

Barnett, the Distinction between Public and Private Functions in Tort Liability of Municipal Corporations in Oregon, 11 Ore. L. Rev. 123 (1932);

Barry, the King Can Do No Wrong, 11 Va. L. Rev. 349 (1925);

Borchard, Government Liability in Tort, 34 Yale L. J. 1, 129, 229 (1924-1925), 36 Yale L. J. 1, 757, 1039 (1926-1927), 28 Col. L. Rev. 577, 734 (1928);

Carraway, Actions Against the Commonwealth for Torts, 1 Com. L. Rev. 241 (1904);

David, Municipal Liability in Tort in California, 6 Southern Cal. L. Rev. 269, 7 *ibid.*, 48, 214, 295, 372 (1933-4);

Davie, Suing the State, 18 Am. L. Rev. 814 (1884);

4 Dillon, Municipal Corporations (5th ed. 1911) ch. 32;

Doddridge, Distinction Between Governmental and Proprietary Functions of Municipal Corporations, 23 Mich. L. Rev. 325 (1925);

Feezer, Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases, 78 U. of Pa. L. Rev. 815 (1930);

Fleischmann, The Dishonesty of Sovereignties, 33 Report of the N. Y. Bar Ass'n 229 (1910);

Freund, Private Claims against the State, 8 Pol. Sci. Q. 625 (1893);

Glushein and Katzin, Administrative Law, etc., 16 Corn L. Q. 359 (1931);

Goodnow, Municipal Home Rule (1895) ch. 7;

Gordon, The Crown as Litigant, 45 L. Q. Rev. 186 (1929);

Harno, Tort Immunity of Municipal Corporations, 4 Ill. L. Q. 28 (1921);

Jones, Negligence of Municipal Corporations (1892);

Laski, The Responsibility of the State in England, 32 Harv. L. Rev. 447 (1919);

MacDonald, Substantive Liability of the State of New York, 1 N. Y. State Bar Ass'n. Bull. 235, 238 (1929);

Maguire, State Liability for Tort, 30 Harv. L. Rev. 20 (1916);

Maitland, The Crown as a Corporation, 17 L. Q. Rev. 131, at 142 (1901);

Martindale, The State and Its Creditors, 7 So. L. Rev. (N. S.) 544 (1887);

6 McQuillin, Municipal Corporations (2d ed. 1928) ch. 53;

Moore, Liability for Acts of Public Servants, 23 L. Q. Rev. 23 (1907);

Rockel, Governmental Function of Municipality—Liability for Tort, 89 Cent. L. J. 27 (1919);

2 Shearman and Redfield, Negligence (6th ed. 1913) ch. 12;

Tennant, Nigel B. Servants of the Crown, 10 Can. Bar Rev. 155 (1932);

Tooke, Public Authorities and Legal Liability, 20 Am. Pol. Sci. Rev. 898 (1926);

Tooke, The Extension of Municipal Liability in Tort, 19 Virginia Law Rev 97 (1932);

Ward, Municipal Liability, 2 N. Y. State Bar Ass'n. Bull. 402 (1930);

White, Negligence of Municipal Corporations (1920);

Williams, Municipal Liability for Tort (1901).

The pedestrian who falls into a hole in the road located on the city line may recover in Tennessee if he dropped in on the city side but not if he fell in on the county side. The decision in other cases of tumbling into unguarded excavations will depend upon what department of the city was at fault or the purpose for which the relevant public improvement was undertaken, whether for parks, water-supply or street repair. If you are killed by contact with a defective municipal electric wire, your widow's recovery may depend upon whether the wire was used for street lighting or for domestic supply of electricity. If you slip on a defectively lighted stairway in a public building used in part for income from rents your recovery may depend on the purpose for which you entered the building. The galloping fire-apparatus bound to a fire has been deemed "governmental"; the same apparatus returning has been classified as "corporate" in the effort to reconcile law with justice. As to navigators on the river, the maintenance of a bridge has been deemed corporate; as to travellers on the bridge, it was governmental. Sprinkling the streets has been deemed governmental, but flushing them corporate. Since legislation began to clear the way for municipal liability arising out of the defective care of streets and highways, courts have found difficulty in classifying the torts of the lowly garbage or ash collector, who generally had been deemed a sovereign guardian of the public health. After city property had to some extent become assimilated to private property with respect to duties of care and maintenance, difficulties were still entertained in many courts in classifying sewers, which by some are deemed an integral part of the health system. But although several factors, to be mentioned presently, have cooperated in weakening the logical barriers against community liability in tort, and although numerous courts have shown ingenuity in breaking away from the fetters of ancient doctrine, on the whole the courts have felt reasonably bound by old precedents in classification, and while often expressing chagrin at the unjust result, have asserted that the cure lay in the hands of the legislature. Where precedents have not stood in the way, there has in recent years been a commendable courage in classifying certain municipal enterprises, such as parks and playgrounds, as corporate in character. The disagreement among the courts of different states, which is the most disconcerting feature of this branch of the law, is ascribable largely to the degree of their subservience to precedent, the extent of their willingness to emancipate themselves from outworn formulae, and their views of policy with respect to municipal liability.

II

The factors which helped to break the bonds of municipal irresponsibility were the increasing municipal ownership of property, especially when connected with injuries to private property, legislation imposing liability, within certain limitations, for the care of streets and highways, and legislation imposing liability for injuries inflicted by the drivers of municipal and state automobiles. These admissions of liability helped to dissipate distinctions that had been deemed fundamental and helped to expose their artificiality. It was perhaps not unnatural that injuries to private property should first be excepted from the rule of immunity, because the principle of compensation for public taking of private property by eminent domain had been written large in the individualist *laissez-faire* economy of the eighteenth and nineteenth centuries; and, incidentally, we may be pardoned a doubt whether the current worldwide attack upon this institution will prove to have been socially constructive. From the taking of property to the injuring of property is but a slight, often a metaphysical or nominal step, so that the tort of nuisance in the maintenance of public property received wide application. But the relatively slow development of the law of personal injuries, not to speak of liability for death, served in general to clothe with immunity damage to the person caused by the defective condition of public property, although it would have required no strain on the imagination to conclude that the ownership of public buildings was a "proprietary" function, imposing liability, regardless of the purpose for which the building was used. Yet with the increase in movables and the broadening concept of injuries to the person, defects in public property served occasionally to impose liability upon the public treasury, even as against the person. To be sure, difficulty was always found in distinguishing nuisance from negligence, for which latter, except in revenue-producing property, the concept of "governmental" function was still frequently invoked to decree immunity.

While the view that negligence in the care and use of public property involves liability has by no means been generally adopted, a significant beginning was made by the state statutes which impose municipal—although not always county—liability for injuries arising out of the defective condition of streets and highways. This function, before the statutes, had generally been deemed "governmental," but the fact that statutes imposing liability in this sphere were so widely adopted negatived the notion that immunity was inherent or fundamental. To be sure, the liability is usually, and rightly it is believed, a limited one, conditioned on such requirements as notice, clear proof of municipal negligence after opportunity to correct the defect, or positive misfeasance, absence of contributory negligence, liability to travelers only, and other conditions. Here the doctrine of nuisances has served to weaken the basis of liability for negligence, many courts construing negligence most strictly in favor of the city. In the construction of public works, the property concept, both as to the source and incidence of the injury, again played its part. Nuisances, when established, imposed liability to property owners affected, personal injuries only by way of exception. More justifiable distinctions were here made between (a) failure to provide public works or deficiencies in plan, considered legislative, deliberative and not susceptible of classification as torts, and (b) negligent execution or administration of public works, although courts are by no means in agreement as to where the line between them shall be drawn. Yet the distinction between planning and administration may be worthy of development, as rational and just, even in its application to other aspects of public service. The analogy to streets and highways has enabled some courts to classify parks and playgrounds as "corporate" or "proprietary" activities, predicating liability.

But it was the motor vehicle which made the most effective contribution to the dissipation of the distinction between corporate and governmental functions. During the last decade or two, numerous states have enacted statutes imposing liability on cities and even on the state for the negligent operation by public officers of governmentally owned motor vehicles, regardless of the particular public service in which the vehicle is employed. Sometimes police or fire service is particularly mentioned. These statutes constitute a recognition of the fact that the injury sustained by the citizen through the operation of governmental machinery is more important as a criterion of liability than is the particular

department by which the injury was inflicted. A motor vehicle in the police, fire, education or health service has the same relation to the public purse and the injured citizen as has a similar vehicle engaged in the transportation, water or gas service. The character of the injury, the question whether a private corporation under similar circumstances would be liable in tort, whether the injurious act was an administrative act within the scope of the officer's or employee's general authority or employment, should be the first, although not the only, test of liability. The Ohio Supreme Court attempted to apply these tests without statute, but this seemed too radical a departure from tradition to a succeeding court and the conclusion was overruled, although Florida, it is believed, has adhered to its view that the first Ohio decision was sound.

Other statutory waivers of immunity have been enacted by various states, but as might be supposed, the earlier doctrines served to construe the waivers narrowly. The first New York statute conferring upon the surviving next of kin of a decedent killed by the "wrongful act, neglect or default" of the state a right to have the claim against the state heard and determined, was construed by the New York Court of Appeals as a right to sue but not to recover judgment, an extraordinary result. Illinois came to a somewhat similar conclusion. Legislative appropriations for tort claims have occasionally been held unconstitutional as gifts. Only recently, when New York City by statute assumed liability for the injuries occasioned to bystanders and others by policemen engaged in attempting to make arrests, the distinguished New York Appellate Division, First Department, in *Evans v. Berry*, 236 App. Div. 334, 258 N. Y. 8, 473, unanimously concluded that an appropriation for the damages caused by a misdirected pistol shot was an unconstitutional gift, finding no moral or equitable obligation on the city which could justify such a payment. Fortunately, the Court of Appeals unanimously reversed the decision (262 N. Y. 61) concluding that the times and public policy had changed, that there was a moral and equitable if not a stronger obligation to assume such liability, and this even though the policeman's shot might not be considered a fault or tort but a perfectly faultless accident. Mob violence statutes are now accepted as traditional, although they involve social and legal theories far more advanced than any community assumption of liability in tort. California, Wisconsin and North Dakota make compensation for certain flagrant errors in criminally convicting the wrong person, although tort may be unprovable. Minnesota and California provide for the defense of employees of the police and fire and other departments by the district attorney and their indemnification for judgments against them under certain conditions. Washington and other states have assumed a more direct liability for the torts of certain public officers. In California, the street and highway liability above mentioned is extended to the dangerous or defective condition of public buildings, grounds, works and property of county, city or school district, provided there was knowledge or notice of the defect or condition which the officer in charge failed after reasonable opportunity to remedy. If the suit is brought against the officer, even for negligence or carelessness, the district attorney defends the suit. Provision for insuring the official or community liability is becoming common. A few recent statutes exempting cities from liability for negligence in the operation of municipal airports are distinctly contrary to the modern trend of legislation.

III

Now that the principle of community liability in tort has been so widely admitted, a movement greatly aided by the Federal Tort Claims bill before Congress[2] and by the English Crown Proceedings bill,[3] the question still remains, how far can the liability be made practical, so as to distribute the risks of public administration more fairly and yet not overburden the public treasury. Some risks life in an organized community necessarily imposes. Certain types of activity falling more closely within the legislative or judicial function, must be exempted from liability. Small communities also would vote against an enlargement of community liability, on the ground that a single accident might cripple them financially. Shall the liability be confined only to municipalities having large populations, or shall the smaller unit be brought in by a distribution of the risk between the unit and the state? Shall the system of insurance, either of public officers with government defense of suits against them, or of direct public liability insurance for tort, be adopted? As we have but little data on the burden this might involve, perhaps it may be best either (a) to proceed by piecemeal legislation, as we have thus far done; (b) admit the principle, but subject it to exceptions and of course strict procedural requirements to protect the public against imposition; or (c) limit the amount of recovery in any particular case in property damage, to $25,000 and in personal injury or death, to $7,500, as the Federal bill does. It is a question whether proposed legislation should leave in force existing statutory waivers of immunity or procedural methods for the settlement of claims against the State or whether the draft of a Uniform Act should be attempted with a view to embracing existing legislation while broadening the liability to cover major cases, and endeavoring to make the law in the several states uniform. The question also arises whether any effort at legislation should be preceded by exhaustive studies of the law of each particular state on the order of Mr. David's valuable study of California law in the Southern California Law Review. The further question arises whether before legislation is drafted, scientific research should be conducted on the present methods and costs of community liability, on the local experience with the insurance of claims, on the probable effects of an enlarged liability, on the most appropriate administrative machinery to accomplish effective and efficient results. All these matters are deserving of consideration by the American people and especially by the legal profession.

In order not to leave this article without the submission of definite suggestions for legislation, the writer ventures with much diffidence to present the draft of a bill, with an explanatory commentary, which he submitted as chairman of a committee of the American Political Science Association dealing with this subject. The Association has undertaken to deal with state, county and municipal liability and the appended bill represents a very tentative effort to embrace the whole subject in one bill. Possibly this is a vain effort, and the draft may be cast aside as worthless. But some of the considerations involved in the very practical task of translating policy into statute may have presented themselves in the course of the work and may be of interest to other students of the subject. For that reason, with full awareness of the deficiencies of the effort, the appended suggestions are offered as a basis for criticism. In the elaboration of the draft,

2. Cf. article in 1 Chicago L. Rev. 1 (1933).
3. 1927, Command 2842.

some of the difficulties which developed in the course of the drafting of the Federal Tort Claims bill have received consideration.

There are many differences between the state and its subdivisions which make it difficult to draft a single bill to cover the manifold activities of the state and its subdivisions. The difficulty is not only of substantive law or even of procedure, but is political and financial in character. Even assuming that the public mind has been prepared for the assumption of governmental responsibility in tort, the smaller governmental units of the state whose tax resources are limited, will be almost certain to object to an assumption of liability which might suddenly bring them to financial ruin. Inasmuch as in most states the smaller communities will have considerable representation in the state legislature, the bill must be so framed throughout as to command the necessary votes.

Some effort has therefore been made in the attached draft to take into account some of these political considerations. Doubtless others have been overlooked.

An additional difficulty not present in the Federal Tort Claims bill is the divergent character of the administrative instrumentalities in our states. Only a few states have courts or boards of claims. Only a few states have a State Administrative Board or General Accounting Office. Local autonomy ought probably not to be interfered with any more than necessary. It would not seem advisable to transfer from local units to a centralized state board all tort claims, but to leave both the appointing power and some responsibility with the local units, while yet distributing the financial burden in such a way that the local unit would not bear too great a burden. The question arises whether any single draft could, even by appropriate local changes, be made a model for the different states. But the attached draft has been prepared on the supposition that such a possibility exists.

In order to win political support, the attached draft limits the liability in property damage to $25,000 in any case, and in the case of personal injury or death, to $7500. The federal limitations are $50,000 and $7500 respectively.

The draft leaves claims under $2500 in the administrative channel and permits suit in the Court of Claims or similar body on claims only in excess of that amount. Juries are necessarily eliminated from the administration of the new responsibility. Claimants injured by political subdivisions of the state are directed to file their claims in such political subdivision under rules and regulations that may be established by what is called in the Act a State Administrative Board, some centralized state body which is to assume principal charge of the administration of the Act. In some states such a state body now exists.

If the (larger) local unit (see below) can agree with the claimant on a settlement under $2500, payment may be made from the funds of the local unit without reference to the State Administrative Board or the legislature. Possibly approval by the State Administrative Board should be provided for.

Section 2 provides that in claims against the *state* settlements under $1000 may be paid from the state general fund on certificate by the State Administrative Board without reference to the legislature.

The State Administrative Board may also settle claims up to $2500. But if the settlement is in excess of $1000, the state legislature must approve it. Whether a similar provision should apply to local units, the writer is not at all sure. But in the federal government the experience has been that Congress is more willing to approve the investigation of and report on claims by the Departments or the General Accounting Office if the Act provides that Congress shall have the final say on the allowance of the claim. It may win political support to make it clear that the allowance of claims in excess of $1000—at least against the state, as such—must receive the final approval of the legislature. If the Act works well, possibly in time the legislature will be willing to abandon this controlling function.

If the claimant is not satisfied with a $2500 settlement, the limit of allowance by the State Administrative Board or the local units, he must then sue on his claim in the Court of Claims or similar body. But even in that event, his claim must be submitted to the State Administrative Board or local subdivision so as to afford an opportunity for settlement in an amount under $2500. The question arises whether it is advisable to authorize the State Administrative Board, with the Attorney-General, to compromise claims in an amount over $2500 or whether such claims should not obligatorily be brought in the Court of Claims, as the draft provides.

Short statutes of limitation are provided. Under section 5 notice of the damage must be filed with the State Administrative Board or the local subdivision within thirty days of the occurrence of the event on which the claim is founded. Within six months of that event the claimant must file a formal claim under rules and regulations to be issued by the State Administrative Board, as provided in section 13. He must then give the State Administrative Board or local subdivision four months to hold a hearing and make a decision. If a decision is made which dissatisfies the claimant or if four months have expired without any decision, he may institute an action against the state or the political subdivision (if he claims over $2500) within six months of the filing of his claim or within six months of the date of the administrative decision and the mailing of a copy thereof to him.

It has been very difficult to figure out a method by which small communities shall be relieved of what might be an excessive burden through the occurrence of a number of negligent acts. As above suggested, the small communities must be won to the proposed Act, unless it is to cover only larger municipalities and the State. It has seemed possible that they might be willing to make some contribution from their tax revenues to a state fund, provided their liability were limited. The method suggested in section 10 is that communities having a gross revenue from taxation less than $250,000 per year—this amount may be too high—shall pay to the state fund two per cent of their tax revenue — possibly this is too much — in lieu of their liability under the Act. The State would assume any excess of liability. This may be justified on the ground that so many local functions are now characterized by the courts as really State functions, carrying immunity. In addition, the local community is often obliged to take care of streets and highways—the source of most tort claims—whereas the use is largely state-wide. It seems fair that the state should assume a share of the liability, a fact which might induce the state to assume a greater share of the expense of maintenance and repair, thus reducing accidents. The burden of maintenance is often too great for a small community reasonably to bear, and a more equitable distribution of this burden seems sound policy. Better statutory definition of the duty of maintenance in streets and highways would also help efficient administration of the liability statute. As an

incentive to efficient government, a local community which does not exhaust its 2 per cent liability contribution in any one year, might be given credit for the unexpended portion in the next year, and returns might be made of excess amounts paid in, say every five years. Insurance of the liability is no permanent solution, for premiums will tend to adjust themselves to the risk assumed and the practice might be conducive to inefficient administration.

The question then arises how proceedings against smaller communities shall be administered. Shall their local councils or executive boards be permitted to adjust such claims when the payment is to be made by the state? They might have less interest in holding the claim down if that were done. The suggestion in section 10 looks to the filing of a claim against the local unit with that unit, but for a review by the State Administrative Board of any settlement and allowance, and provides that all suits arising out of the claim shall be brought jointly against the state and the local subdivision. This suggestion is admittedly very debatable.

It has been suggested that to avoid the cumbersome necessity for claimants of trifling amounts having to submit their claims to the state capitol, with reports from local officers to the State Board of Administration and possibly a visit by a state official to investigate an unimportant local accident, the smaller local units might themselves be willing to assume, under rules from the State Board, liability for injuries in which the claim amounts to less than $100. Inasmuch as most claims would probably be for small amounts, decentralization to this extent might prove helpful in administration, would assure local subdivisions against unknown or excessive liability, and would also guarantee the sense of local responsibility which a complete immunity from local liability might sacrifice. State rules would simplify the procedure and make it uniform. Promptness of adjudication for small claims would also be assured. While it may be impossible to predict the number of tort claims, the risk could hardly be great, for the liability is limited. This provision for local assumption of limited liability independently of the contribution to the state fund is not included in the appended draft, but it might be given consideration. It may be added that a research body in each state ought closely to observe the administration of the Act, to determine by experience the necessary amendments and modifications.

The provisions for claims arising out of personal injury and death follow to a considerable extent the provisions of the federal Act, in which they were given much consideration.

Contributory negligence is a defense, but "governmental function" is barred as a defense (sec. 6).

It is believed that in the beginning certain exceptions from liability must be provided for, and these are noted tentatively in section 11. Possibly the bar or city attorneys will suggest further limitations that seem desirable or expedient.

Uniformity of administration of such an Act seems an important consideration. Unless some central state body can be charged with the entire administration, thus relieving the local units—a plan not deemed at the moment feasible—it seems nevertheless desirable that some central body should establish rules and regulations unifying the practice among the different local units. The courts will presumably ultimately establish by decision some binding rules. But it would be undesirable for the different local units at any time to adopt various rules, substantive and procedural. For that reason section 13 suggests that the State Administrative Board shall supervise the administration of the Act by establishing rules and regulations for the investigation and report of events likely to lead to claims. Those rules must also contain provisions for subpoenaing witnesses and for making proper defenses, holding hearings, cross-examinations, taking depositions, and other proceedings incidental to the investigation of facts and the determination of questions of law. The federal Act contains several sections outlining the functions of the Attorney-General in conjunction with the General Accounting Office in subpoenaing witnesses, cross-examining the plaintiff's witnesses, taking depositions, and holding hearings. Possibly such provisions should be contained in the model Act. On the other hand, a State Administrative Board could establish such regulations equally well. It is a question of policy whether the Act should be heavily encumbered with such technical rules.

The various other provisions of the Act for the protection of the state or community against unjust claims, for the limitation of attorneys' fees, for the prevention of assignments, etc., will be self-explanatory. The last section (20) suggests that any claim in excess of $25,000 shall, as at present, be submitted to the legislature, which may, however, refer said claim to the Court of Claims for investigation, hearing, and report. This may serve to establish a more regular practice in large claims, while leaving them in the entire control of the legislature.

Tentative draft of a possible state act for the settlement of claims against the State of ——— and its political subdivisions on account of property damage, personal injury, or death.
Be it enacted, etc.

SECTION 1. Subject to the limitations of this Act, the state and every county, city, municipal corporation, school district, district established by law, and other political subdivision of the state shall be liable in an amount not exceeding $25,000 to every person who sustains damage to his property which is the proximate result of the wrongful or negligent act or omission of any public officer, commission, department, board, institution, agent, or employee of the state, county, city, municipal corporation, school district, district established by law, and other political subdivision, respectively, within the scope of his or its authority and not arising out of contract. Except as otherwise herein provided, the person injured may sue the employing state, county, city, municipal corporation, school district, district established by law, and other political subdivision of the state, as the case may be, in the Court of Claims (or similar body in the state) or any other court having jurisdiction of civil suits against the state or the particular subdivision in question, as the case may be.

SECTION 2. The State Administrative Board (as in Michigan) is hereby vested with power and authority to hear, consider, and determine claims presented to said Board against the state or against any political subdivision thereof which has not already established a board, council, body, or officer authorized to settle private claims against the said subdivision, and, subject to the provisions hereinafter set forth, may settle, adjust, and allow any claim not exceeding $2500 in amount, payment of which, if under $1000, may be ordered from the general fund. Like power and authority is hereby vested in the boards, councils, or other appropriate officers of counties, cities, municipal corporations, school districts, districts established by law, and other political subdivisions now having jurisdiction by law to settle claims against the said corporations or political subdivisions, except that payment of claims may be ordered only from the funds of such county, city, municipal corporation, school district, district established by law, or other political subdivision, as the case may be: Provided, That the said county, city, municipal corporation, school district, district established by law, or other political subdivision has not made the contribution to the state fund provided for in section 10.

SECTION 3. Subject to the limitations of this Act, the state and every county, city, municipal corporation, school district, district established by law, and other political subdivision of the state shall be liable in an amount not exceeding $7500 to every person who sustains personal injury or death, if the injury or death was either (1) proximately caused by the wrongful or negligent act or omission of any officer or employee of the

(*Continued on Page* 793)

THE WARSAW CONVENTION AND THE C. I. T. E. J. A.*

The United States Approves the Warsaw Convention Relating to International Carriage of Passengers and Goods by Air—Important Provisions Set Forth and Explained—Senate Reservations as to First Paragraph of Article 2—Organization and Function of the International Technical Committee of Aerial Legal Experts—Scope of Work, Etc.

By Stephen Blatchford

Member C. I. T. E. J. A.; Technical Assistant Treaty Division, Department of State

ON June 15, 1934, the Senate of the United States gave its advice and consent to adherence on the part of the United States to the International Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw, Poland, on October 12, 1929, and the Additional Protocol thereto relating to Article 2 of the convention. Pursuant to the terms of Article 38 of the convention the convention came into force between the United States and other countries parties thereto ninety days after the deposit of the instrument of adherence of the Government of the United States with the Polish Government as the depositary of the signed convention. This deposit was made on July 31, 1934, and the convention therefore became effective as to the United States on October 29, 1934.

The Warsaw Convention was signed on behalf of the following twenty-three countries: Germany, Austria, Belgium, Brazil, Denmark, Spain, France, Great Britain and Northern Ireland, Australia, Union of South Africa, Greece, Italy, Japan, Latvia, Luxembourg, Norway, The Netherlands, Poland, Rumania, Switzerland, Czechoslovakia, Union of Soviet Socialist Republics and Yugoslavia.

The following signatory powers have become parties to the Warsaw Convention by ratification of the convention: Spain, Brazil, Rumania, Yugoslavia, Poland, France, Latvia, United Kingdom of Great Britain and Northern Ireland, Italy, The Netherlands, Germany and Switzerland. In addition, the Union of Soviet Socialist Republics deposited its instrument of ratification of the convention with the Polish Government on August 20, 1934, to become effective ninety days from that date. The United States, Mexico and Liechtenstein, nonsignatory powers, became parties to the convention by adherence. It will be seen from the foregoing that the convention is already in force over a large part of the world where air transportation is conducted on an international basis.

The following is a summary of the more important provisions of the Warsaw Convention:

General Scope of the Convention

Article 1 of the convention reads:

"(1) This Convention shall apply to all international transportation of persons, baggage or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

"(2) For the purpose of this Convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this Convention.

"(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this Convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party."

Provisions showing the scope of the convention are also found in several other articles of the convention. Article 2 provides that the convention shall apply to transportation performed by the State or by legal entities constituted under public law provided it falls within the conditions laid down in Article 1, but that the convention shall not apply to transportation performed under the terms of any international postal convention.

The first paragraph of Article 18 provides that the carrier shall be liable for damage sustained in the event of the destruction or loss of or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air. Transportation by air is defined in the article as follows:

"(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

"(3) The period of the transportation by air shall not extend to any transportation by land, by sea or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air."

Article 31 provides that in the case of combined transportation performed partly by air and partly

*The initial letters stand for Comité International Technique d'Experts Juridiques Aériens.

by any other mode of transportation, the provisions of the convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of Article 1. However, nothing in the convention will prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of the convention are observed as regards the transportation by air.

Article 34 provides that the convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, and that the convention shall not apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Air Transportation Documents

For the transportation of passengers the carrier must deliver a passenger ticket, and for the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check. Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill", and every consignor has the right to require the carrier to accept this document. Detailed provisions in regard to the form and legal effect of these transportation documents are found in Articles 3 to 16 inclusive of the convention.

Liability of the Carrier

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. (Article 17.)

As previously stated the carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air. (Article 18.)

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage or goods. (Article 19.)

The effect of the liability provisions referred to above appears to be to create a presumption of liability against the aerial carrier when damage or loss occurs, subject to certain defenses allowed under the convention to the aerial carrier.

Article 20 provides that the carrier shall not be liable if he provides that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. The article further provides that in the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21 allows the defense of contributory negligence and provides that if the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

The liability of the aerial carrier is limited by Article 22 to the following amounts:

125,000 gold francs for each passenger.

250 gold francs per kilogram for checked baggage and goods, unless there is a special declaration of value made by the consignor and an additional sum paid by him if the case so requires; and

5,000 gold francs for objects taken care of by the passenger himself.

It is provided in Article 22 that a higher limitation of liability than 125,000 gold francs, with respect to the transportation of passengers, may be agreed to by a special contract between the carrier and the passenger.

Article 25 provides that the carrier shall not be entitled to avail himself of the provisions of the convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct. Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 27 provides that in the case of the death of the person liable, an action for damages lies in accordance with the terms of the convention against those legally representing his estate.

Article 28 provides that an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination. Questions of procedure will be governed by the law of the court to which the case is submitted.

Article 29 provides that the right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped. The method of calculating the period of limitation will be determined by the law of the court to which the case is submitted.

Additional Protocol to the Convention

The additional protocol to the convention states that the High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of Article 2 of the convention shall not apply to international transportation by air performed directly by the State, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority.

The first paragraph of Article 2 of the convention states that the convention shall apply to transportation performed by the State or by legal entities

constituted under public law provided it falls within the conditions laid down in Article 1.

In giving its advice and consent to adherence on the part of the United States to the convention and additional protocol, the Senate of the United States made a reservation to the effect that the first paragraph of Article 2 of the convention shall not apply to international transportation that may be performed by the United States or any territory or possession under its jurisdiction.

Organization and Preliminary work of the C. I. T. E. J. A.*

The Warsaw Convention is the first of a series of conventions on various subjects of private aerial law which have resulted or will result from the deliberations of the C. I. T. E. J. A. This is an international organization engaged in the preparation of a comprehensive code of private air law through the adoption of draft conventions on which final action is taken at general international conferences called for the purpose of considering the drafts.

A draft convention which contained provisions regarding the liability of the aerial carrier in international transportation was submitted by the French Government to the First International Conference on Private Air Law which met at Paris on October 27, 1925. A convention relating to the liability of the aerial carrier in international transportation was signed by the delegates to this conference. One of the very important results of the international conference held in 1925 was the adoption by the conference of a resolution providing for the creation of the Committee for the purpose of continuing the work of the conference.

The Committee held its first session at the Ministry for Foreign Affairs in Paris, May 17 to 21, 1926. Twenty-eight countries appointed representatives to attend this session. The United States was represented by an observer. The Committee has held nine sessions as follows: Paris, 1926; Paris, 1927; Madrid, 1928; Paris, 1929; Budapest, 1930; Paris, 1931; Stockholm, 1932; London, 1933; Berlin, 1934. The tenth session of the Committee will be held at Lisbon in 1935.

The Committee divided the study of questions of private air law and the preparation of draft international conventions among four subcommittees referred to as commissions. The general plan has been for some of the commissions to meet during the first half of the year and for the others to meet during the second half of the year, the second meeting of the commissions being immediately followed by the plenary session of the Committee.

The convention regarding the liability of the aerial carrier signed at the First International Conference on Private Air Law in Paris in 1925 was referred to the Committee for further study. This convention was considered at the first three sessions of the Committee which completed its work on the convention at its third plenary session held at Madrid from May 24 to 29, 1928. The draft completed by the Committee was referred for consideration to the Second International Conference on Private Air Law held at Warsaw, Poland, from October 4 to 12, 1929. The Warsaw conference completed the work by the adoption of a convention for the unification of certain rules relating to international transportation by air, which was signed by twenty-three countries on October 12, 1929.

*For an article entitled "The History and Accomplishments of the International Technical Committee of Aerial Legal Experts," by John Jay Ide, see 3 Journal of Air Law 27-49. See also "International Control of Aviation" by Kenneth W. Colegrove, 95-104 and an article by the same writer entitled "The International Aviation Policy of the United States," 2 Journal of Air Law 458-460.

Scope of the Work of the C. I. T. E. J. A.

When the C. I. T. E. J. A. was organized, it referred the following subjects for study to four commissions functioning under its authority:

First Commission

1. Nationality of aircraft;
2. Aeronautical register;
3. Ownership, co-ownership, construction and transfer;
4. Vested rights, mortgages, privileges and seizure.

Second Commission

1. Category of transportation (commercial transportation, touring, etc.);
2. Bill of lading;
3. Liability of carrier towards consignors of goods and towards passengers;
4. Jettison of cargo and general average;
5. Renting of aircraft.

Third Commission

1. Damage and liability toward third parties (landing, collision and jettison);
2. Limits of liability (contractual limitation, abandonment);
3. Insurance.

Fourth Commission

1. Legal status of commanding officer and crew;
2. Accidents to the crew and insurance;
3. Status of passengers;
4. Law governing acts committed on board aircraft.

The following subjects have been considered by the Committee and its commissions:

Mortgages on planes and preferential rights;
Aeronautical register;
Bill of lading;
Liability of the carrier;
General average;
Liability for damages caused by aircraft to third parties on the surface;
Collision of aircraft;
Insurance;
Damages caused at aerodromes;
Assistance and salvage of aircraft;
Guaranties to be given by the operator;
The legal status of the commander and crew;
Renting of aircraft;
Interpretation of private air law conventions by the C. I. T. E. J. A.

Completion by the C. I. T. E. J. A. of Draft Conventions for Consideration at International Conferences on Private Air Law

There have been three International Conferences on Private Air Law. The first, held in Paris in 1925, and the second at Warsaw in 1929, have already been discussed. A draft convention regarding the liability of the aerial carrier in the transportation of passengers and cargo was signed at the

First Conference and referred to the Committee for further consideration. The Committee draft of the convention was considered and completed at the Second Conference.

The Third International Conference on Private Air Law was held at Rome, Italy, from May 15 to May 29, 1933, for the purpose of taking action on a draft international convention on the precautionary attachment of aircraft and a draft international convention on liability for damages caused by aircraft to third parties on the surface, both of which had been prepared by the Committee. The conventions as adopted at the Rome conference are entitled "Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft" and "Convention for the Unification of Certain Rules Relating to Damages Caused by Aircraft to Third Parties on the Surface."

Two draft international conventions which were adopted by the Committee at its Sixth Plenary Session held at Paris in October, 1931, have not yet been referred to a general International Conference on Private Air Law for final action. One is entitled "Draft Convention on Mortgages, Other Real Securities, and Aerial Privileges"; the other is entitled "Draft Convention on the Ownership of Aircraft and the Aeronautic Register."

The Fourth International Conference on Private Air Law will be held in 1936. Full details in regard to the conference have not yet been received.

The United States was not officially represented at the First and Second International Conferences on Private Air Law, being represented only by observers. This country was, however, represented at the Third International Conference on Private Air Law by officially accredited delegates who signed, on behalf of the United States, the two conventions adopted at the conference. The delegates of the United States were John C. Cooper, Jr., Chairman of the Committee on Aeronautical Law of the American Bar Association; Theodore Jaeckel, American Consul General at Rome; and John Jay Ide, Representative in Europe of the National Advisory Committee for Aeronautics. Harold H. Tittmann, Second Secretary of the American Embassy in Rome, was an alternate delegate. Mr. Cooper was chairman of the American delegation. The two conventions signed at the Rome Conference are not yet in force. Spain is the only country that has so far ratified the two conventions. They will not come into force until after they have been ratified by five of the signatory powers.

The present members of the American section consist of Mr. Denis Mulligan, Chief of the Enforcement Section, Bureau of Air Commerce, Department of Commerce; Mr. Fred D. Fagg, Jr., Managing Director, Air Law Institute, Chicago, and Professor of Law, Northwestern University School of Law; and the writer. Mr. John Jay Ide, Technical Assistant in Europe for the National Advisory Committee for Aeronautics, is technical assistant to the American members of the Committee. The members of the American section have, in the absence of an appropriation to defray the expenses of traveling abroad, participated in the work of the Committee and its commissions to such extent as has been found to be practicable through correspondence.

INSTRUCTIONS FOR PARTICIPANTS IN 1935 ESSAY CONTEST

Conducted by

AMERICAN BAR ASSOCIATION

Pursuant to Terms of Bequest of Judge Erskine M. Ross, Deceased.

Those eligible to participate:

Members of Association in good standing, exclusive of previous contest winners, officers, members of Executive Committee, and employees of the Association.

Subject to be discussed:

"The Barrister and the Solicitor in British Practice: The Desirability of a Similar Distinction in the United States."

Length of Paper:

Not more than 5,000 words of text, excluding footnotes. Each paper to be submitted in triplicate (to expedite committee's action); original to show number of text words on each page.

Amount of prize to be awarded:

One Thousand Dollars ($1,000.00) in cash.

Time when papers must be submitted:

On or before March 1, 1935.

Assignment of interest:

All entrymen will be required, in lieu of an entry fee, to assign to the Association all right, title and interest in the discussion submitted, with the understanding that all discussions not desired for further use by the Association, will be returned to the respective authors, and the interest of the Association therein waived.

Person to whom essay and identifying number should be sent:

Olive G. Ricker, Executive Secretary,
American Bar Association,
1140 North Dearborn Street,
Chicago, Illinois.

Instructions for preparing and mailing essay:

1. Papers submitted must be typewritten on plain white paper, letter size, (8½ x 11), and be mailed without folding, in plain envelope furnished for the purpose.

2. Only the number assigned to contestant may be attached to the essay; any other identifying number, name or mark thereon will disqualify the entry.

3. Quadruplicate number, attached to card or sheet of paper, giving full name and address of contestant must be mailed in separate plain sealed envelope, also furnished to contestant, for purpose of identification after winning paper is selected.

For convenience of contestants there will be forwarded upon request:

1. Quadruplicate numbers in sealed envelope.
2. Large addressed envelope for mailing essay.
3. Small addressed envelope for sending identifying number with name and address of contestant.

Binder for Journal

The Journal is prepared to furnish a neat and serviceable binder for current numbers to members for $1.50. The price is merely manufacturer's cost plus expense of packing, mailing, insurance, etc. The binder has back of art buckram, with the name "American Bar Association Journal" stamped on it in gilt letters. Please send check with order to Journal office, 1140 N. Dearborn St., Chicago, Ill.

CALIFORNIA UNIFIES ENFORCEMENT AGENCIES TO FIGHT CRIME

Constitutional Amendment Adopted at Last Election Imposes on Attorney General Duty of Seeing That Criminal Laws Are Adequately Enforced by Sheriffs and District Attorneys—Where They Are Negligent, He Must Go into Counties and Prosecute Violators Himself—State Department of Justice Practically Created

By Hon. William A. Beasly

Chairman of Sub-Committee on the Administration of Justice of State Bar of California

AT THE November election California adopted an amendment to its Constitution which unifies the work of its most important law enforcement agencies, the prosecutors and sheriffs, by placing those officers under the direct control of the State's Attorney-General. Its main points are: first, the setting up substantially of a state department of justice with the attorney-general at its head, without creating any new offices or agencies; second, vesting in the attorney-general the authority and laying upon his shoulders the duty of seeing that the penal laws of the state are adequately and uniformly enforced by sheriffs and district attorneys in every part of it. The vital force of the amendment is a provision that the attorney-general must exercise direct supervision over every district attorney and sheriff in the state.

The forecast of what this reform may portend is a provision that the legislature or the people by initiative may by statute include any and all law enforcement officers of the state under the control of the attorney-general. The amendment is positive and mandatory. It leaves no room for an attorney-general to shirk its enforcement for it expressly provides that after he shall have tried to make law enforcement agencies under his control do their duty, he shall go into the county where neglect occurs and himself prosecute the violators of the law. The amendment does not give the attorney-general authority to remove a negligent officer, but the moral condemnation which will probably accompany any finding by him that a sheriff or district attorney is negligent or inefficient will probably be followed by popular disapproval of the recalcitrant officer to such a degree that he can hardly be elected again and may be recalled if his remissness shall be sufficiently offensive.

Some explanation of the occasion for writing this provision into California's already over-burdened constitution may be necessary. The duties of the attorney-general are not specified in the constitution. The attorney-general has no supervision over the sheriffs of the state and the sheriffs, except in San Francisco, are the chief law enforcement officers of the counties. The attorney-general before the adoption of the amendment under consideration had certain limited powers of supervision over district attorneys under the political code, but he had no control over sheriffs, and his control over district attorneys was limited. It has been held by the higher courts of California that it is not within the power of the legislature to impose duties upon the attorney-general beyond the functions of the office as it existed in other states before the first constitution of California was adopted. The natural hesitancy of the attorney-general to step into a county and take charge of the enforcement of the criminal law therein in response to a permissive statute is completely changed by the mandate of the constitution itself that he shall in the proper case do exactly that. And again if this mandate were not written into the constitution, a politically hostile legislature could cripple the attorney-general in his efforts by depriving him of some of the authority which the late election shows to be regarded as all-important by the public. The amendment also makes the attorney-general independent of the legislature in the use of funds for carrying out the provisions of the amendment, subjecting him in this matter only to the approval and consent of the Governor and the State Controller. He is thus made a free agent in the enforcement of the law in every county in the state. So much for the provisions of this new and radical "constitution-statute."

Its significance can be better understood if the history of its formulation and adoption is known. On November 9th, 1933, a serious kidnapping and murder took place in one of the larger counties of the state—a crime that shocked the entire nation. Intense excitement prevailed all over California until the criminals were discovered and arrested. The sheriff of the county in which the crime was committed found himself incapable of effectually pursuing the hunt for the culprits. The Bureau of Criminal Investigation of the Federal Department of Justice took charge and ran the murderers to earth. The necessity for Federal assistance awakened the state to the inefficiency of its own machinery for the apprehension of such criminals. So inflamed was the public mind and so distrustful were the people of the county of the ability of its local law enforcement officers to convict and punish these men that a mob dragged them from jail and hanged them; and this in one of the most enlightened and orderly communities in the United States. The lynching was approved by the Governor and condemned by Ex-President Hoover, in the county of whose residence the affair occurred. With this controversy going on the crime could not be forgotten; nor could the method of apprehension, the lynching, nor the lack of faith of the people in the accomplishment of justice by local authorities under the legal restrictions imposed upon them.

So a leading lawyer of the county where the crime was committed started a serious crusade for such amendments of the criminal law as would make the detection and conviction of criminals more prompt and certain. The State Chamber of Commerce, the Commonwealth Club of San Francisco, a civic organization that seriously studies such problems, the California State Bar Association, the California League of Women Voters and many other influential organizations took up the cry. Their appointed committees finally formulated this amendment, among several which, it was thought, were calculated to correct the weaknesses of the penal laws of the state. This amendment and the others were framed after careful study by the laymen of the various committees aided at every step by able lawyers appointed by the President of the State Bar Association.

When the committees began their study, they promptly discovered that one of the greatest obstacles to the detection and conviction of criminals was the lack of co-ordination of effort among the law enforcement officers of the state. Another and perhaps a greater weakness was the lack of trained detectives. The promptness and efficiency of the federal investigators in the case of the San José kidnappers emphasized both these weaknesses in the state's system. These deficiencies were brought out still more clearly by the recollection of the manner in which the notorious kidnapper and murderer Hickman traveled from Los Angeles to Seattle through the territories of many sheriffs in a car the description of which was known to the police. Still greater emphasis was placed upon the lack of unified efforts by the kidnapping of two peace officers in San Rafael, near San Francisco, by two escaped convicts from San Quentin penitentiary, and the transportation of the officers to San Bernardino, a distance of about five hundred miles, before the "captives" were released and the convicts killed. These men traveled with their captives over bridges that spanned great rivers and which were easily guarded; through long strips of straight roads, where there were no by-paths by which they could have left the track, and through mountain passes where they could have been stopped at a hundred points. No peace officer got in their way. This incident made a profound impression upon the committees. They realized that genuine cooperation of trained "thief catchers" throughout the length and breadth of the state was necessary. There had been an attempt by peace officers' associations and associations of district attorneys to work together, but these attempts had been voluntary, and while they were effective to a degree it was realized by the committees that a firm hand from above, able and willing to direct the work of detection and conviction, was necessary if the state's efforts were not to be ineffectually spent.

The committees found certain agencies already organized in the state which were not being used. For example, an efficient motor vehicle corps was in existence. It had state-wide authority over vehicular accidents but with no other police authority and was not subject to any other direction than that of its own chief. They found in existence a State Bureau of Criminal Identification, manned by men skilled in finger printing, in the detection of forged documents, in chemistry, photography, physiology, ballistics, and at the command of any sheriff who should voluntarily ask for its assistance. They found also the inspectors of the Agricultural Department of the state stopping at its borders every car that entered it, even stopping aeroplanes that flew from foreign countries and distant states, to inspect them for infected agricultural and horticultural products. They were told by the police that every stolen automobile that entered the state carried from one to three potential, if not actual, criminals and they realized that if the Department of Agriculture could stop and inspect cars for infected vegetables, it might also under proper direction determine whether or not the car itself was stolen. They found that able corps of inspectors were maintained by the State Board of Pharmacy, the State Medical Association, the State Inspector of Weights and Measures, and several other minor departments of the state government, all of whom might be of assistance in the solution of crime problems. They found that three of the great cities of the state maintained efficient police schools, training their officers in the detection of crime and the apprehension of criminals. But, they also found that these agencies were not working together except in a voluntary and desultory way. The sheriff, often elected for his lodge-room popularity, although completely ignorant of modern police methods, was often so anxious to make political capital by solving a great crime that he would not divide the credit by calling any of these efficient state agencies to assist him in doing so. District attorneys and sheriffs often failed to give each other hearty support and these officers in adjoining counties often worked at cross purposes where cooperation was necessary; and often prosecutors would not call upon the attorney-general for the assistance which he might furnish them when they sorely needed his help.

So, the committees determined to lay the heavy hand of the constitution upon these agencies. They were compelled, however, to take into consideration the political possibilities involved. A constitutional amendment, of course, must be adopted at an election. Undertaking to establish a state police or to have added a new commission for the control of these agencies to the officials of the state would have been to court defeat at the polls. They, therefore, took what may be called a middle course. At this point it might be added that numerous district attorneys of the state were willing to cooperate in carrying out this plan and the same may be said of more than a few of its more enlightened sheriffs. The State Peace Officers' Association endorsed the plan that was finally adopted and the district attorneys' associations were always in favor of it or something like it. So just a natural situation rather than any inclination resulted in the weaknesses above described. The leading chiefs of police of the state were in favor of the plan.

The committees settled down to their work and after canvassing the situation for many weeks finally proceeded to place the constitutional amendment upon the ballot. A vigorous campaign was waged by the State Chamber of Commerce, the State Bar Association, the Commonwealth Club and especially the California League of Women Voters and other organizations of women in behalf of the plan. Through one of the most exciting

gubernatorial and congressional campaigns that can be remembered by even the oldest Californians this proposition, among others, was kept prominently before the public. The newspapers in the main suported it. The amendment was adopted by a substantial majority.

California has always been advanced in its attitude toward crime. It has upset many traditions. Among the first of its steps in advance was the adoption of the preliminary examination and the filing of an information by the district attorney as a method of charging crime in courts of general jurisdiction. A hard fight was waged over this constitutional provision some sixty-five years ago. The time honored indictment by the grand jury had been found to be clumsy and slow, however, and the people of the state determined to and did supplement it by the speedier and more effective procedure. Twice in its history the state has attempted to wipe out technicalities in the administration of its criminal law. Its very first penal statute provided that no conviction should be reversed for any technicality which did not prejudice the defendant in a substantial right. Twenty years ago it wrote into its constitution a provision that no conviction should be reversed and no new trial granted for any technical defect or error of pleading or evidence or procedure unless the court could see, after an examination of the entire record, that it had resulted in a miscarriage of justice. This latter provision was brought about by a decision of the Supreme Court of California that it would not judicially notice who was Mayor of San Francisco and by two cases in which it was held that a failure to allege that a person killed was a human being was a ground for reversing two atrocious murder cases.

I predict that something else can be seen growing out of the reforms that were adopted at the recent election. They consist in a permission for the defendant, under complete safeguard of his rights, to plead guilty upon his first appearance before a magistrate; that the court may instruct the jury upon the facts as is now done in the Federal Courts, instead of being compelled simply to state the evidence and declare the law; and, more important still, that a defendant faced with convincing evidence of his participation in a crime must either take the witness stand and explain or be subject to the natural inference that is drawn in ordinary affairs of life from the fact that a man remains dumb when charged with an offense.

One other amendment to the constitution adopted at this recent election is still more significant. Under it judges of courts of record cease to be elective. They are appointed by the Governor with the approval of the Chief Justice, the Attorney-General, and the Presiding Justice of the Court of Appeals of the district in which the vacancy occurs—except that in case of the appointment of a Justice of the Supreme Court it is the Presiding Justice who has served longest as such upon any of the District Courts of Appeal who is called on to act. They may be recalled, and at the end of their terms must be elected, but no opponent's name will appear on the ballot. "They run against their record." However, the amendment does not apply to any county until adopted by a vote of its citizens.

The grim notice that has been served upon criminals by the manner in which these amendments were adopted would seem to indicate that California has determined to suppress crime and that the man or organization standing in the way of its suppression had best have a care as to the methods employed to thwart the law.

DEPARTMENT OF CURRENT LEGISLATION

Constitutional Amendments: 1931-34 (Continued)

BY WARNER W. GARDNER

MUNICIPALITIES.—The expenditure of no county, city and county, municipality, district, or other political subdivision is to exceed that of the precedng year by more than 5% unless authorized by vote of the electors (majority in municipality, two-thirds in others) or unless authorized by the State Board of Equalization. Expenditures for interest and redemption charges upon bonds already issued, for publicly owned utilities, or arising out of any gift or bequest are not included. The restriction continues until June 30, 1935, and may be continued by the legislature for any period. (Cal., XI 20) 1933.

Indebtedness created for acquisition, construction or operation of a public utility not to be considered indebtedness under the requirement that the indebtedness of city, town or village not exceed 5% of the taxable property. (Wis., XI 3) 1932.

City of New Orleans authorized to purchase ferry system, the indebtedness so incurred not to be calculated under debt limitations. A ferry board, its members to be appointed by the mayor, is created. Revenues to be kept in separate account, and used to retire the bond issue in 30 years. (La., XIV 31) 1932.

Pensions. General assembly authorized to grant, or authorize the grant of, pensions to persons over 70 years of age who are without means of support or livelihood. (Mo., IV 47) 1932.

Legislature authorized to appropriate for pensions to blind persons over 21 years of age. (Pa., III 18) 1933.

Veteran's compensation system restricted by for-

bidding any cash bonus and by allowing loans only until 1938. (Ore., XI-c 5) 1933.

Ports. Legislature empowered to create port, harbor and terminal districts which are to be political subdivisions of the state with corporate powers. They are to have authority to construct and operate wharves, elevators, warehouse, belt line railroads, etc. May levy taxes, collect tolls, borrow money and exercise the privilege of eminent domain. (La., XIV 31) 1932.

Harbor commission empowered to change the harbor lines which it has established. (Wash., XV 1) 1932.

Prize-fighting. Legislature may provide for the supervision of wrestling and boxing matches. All fees therefrom, except those used for expenses of the athletic commission (established by the initiative act of 1924) to be used for the maintenance of veterans' homes. The legislature may make minor changes in the initiative act of 1924. (Cal., IV 25 ¾) 1932.

Public Officers. Until October 1, 1935, all provisions of the constitution are suspended which restrict the power of the legislature to reduce the salary or fees of any public officer of the state, counties or municipalities. Until that date the total annual compensation paid to any such officer shall not exceed $6,000. (Ala., XXIV) 1933.

Officers or enlisted men retired from the military or naval service of the United States are not to be included in the prohibitions against payment of compensation to any one who holds a position under the United States, or against holding at the same time more than one civil office of profit. (Tex., XVI 33, 40) 1932.

Railroads. Provision eliminated that no railroad shall charge more for the transportation of persons or property than is charged for the transportation of persons or property of the same class to a more distant point in the same direction. (Pa., XVIII 3) 1933.

Roads. Road lighting districts may be created, by the police juries, wholly within a parish. The police jury to be the governing authority. Corporate powers. On approval of a majority of the electors, may levy a tax up to 5 mills on all property except railroad tracks and rights-of-way. (La., new art., L. 1932, No. 63) 1932.

Indebtedness of counties and of the Coastal Highway District incurred before September, 1931, for the construction of roads under the supervision of the state highway department is assumed by the state. The highway department is to pay the debt from its funds at the rate of not less than 10% per year, beginning in 1936. (Ga., VII 8) 1932.

State Debt. $25,000,000 bond issue authorized, the proceeds to be used for general purposes. (Pa., IX 17) 1933.

Bond issue authorized, the proceeds to be used for refunding purposes; special 1.15 mill tax provided for repayment. (La., IV 12) 1932.

Bond issue in the amount of $10,000,000 authorized, the proceeds to be used in the acquisition of toll bridges, the tolls therefrom to be used to retire the bond issue. (Pa., IX 16) 1933.

Bond issues authorized, the proceeds to be used for relief purposes: $20,000,000, to be loaned to cities and counties, (Cal., XVI 9) 1933; $20,000,000 to be distributed fairly over the state and the taxes to retire which to be raised by means other than a levy upon real property, (Tex., III 51a) 1933.

Bond issue in the amount of $50,000,000 authorized, the proceeds to be used in veterans' compensation. (Pa., IX 16) 1933.

Provision modified which declared void the creation of any new state debt save for $300,000 of temporary borrowing. Governor empowered to pay interest on the debt shown by outstanding warrants, and the proceeds of the income tax are pledged to pay the principal. Acts of the legislature appropriating the amounts are ratified and the credit of the state pledged for its repayment. (Ala., XXIII 213) 1933.

State Finances. The governor within 15 days of the convening of the legislature in regular session shall present a budget showing estimated revenues and recommending an itemized and complete plan of expenditures. (Mo., V 13) 1932.

Hereafter unlawful for comptroller to draw any warrant upon the treasurer if the latter have insufficient funds to meet it. If all proper claims cannot be met at the end of the fiscal year, the comptroller is to reduce each warrant pro rata, and all unpaid appropriations are then to be null and void to the extent that they are in excess of the funds on hand. (Ala., XXIII 213) 1933.

Beginning of the fiscal year changed from January 1 to July 1. (S. C., X 10) 1933.

Taxation: Limitation. State tax after 1933 limited to 1 cent per $100 of real or personal property except to pay interest and principal on outstanding bonded indebtedness. (Income tax provided, see below). (W. Va., X 1) 1932.

The limit to the total of ad valorem taxes levied for all purposes reduced from 31½ to 15 mills. The state allowed to levy no ad valorem taxes, instead of its former limit of 3½ mills. Provision eliminated that additional taxes for school purposes could be levied to the extent of 2 mills for counties, 5 mills each for townships and school districts, and 10 mills for cities or towns; the provision remains, however, that the tax rate for school purposes may be raised by an additional 10 mills if a majority of the voters in the taxing district approve. Counties may levy an additional 2 mill tax for the purpose of providing separate schools for negro and white children. And an additional levy may be made to retire or pay the interest upon the indebtedness of the state or subdivision, provided that the total levy must not exceed that authorized prior to the amendment. (Okla., X 9) 1933.

Total levy on property limited to 1½% of value for all purposes, except to pay interest and principal on outstanding indebtedness. The limitation may be raised, but not over 5% or for longer than a 5-year period, on a two-thirds vote of the assessing district or when provided by a municipal charter. (Mich., X 21) 1933.

Limitation on total taxes to be levied upon property for state and local purposes lowered from one and one-half per cent. to one per cent. of its true value. (Ohio, XII 2) 1933.

Real and personal property may bear only 25% of the funds raised by the state. (Cal., IV 34a) 1933.

The limitation upon taxation of real and personal property (10 mills for state purposes) extended to limit the taxation for all purposes to 20 mills, except necessary levies for the public debt, special levies on specific classes of property and additional taxes approved by a majority of the taxing district. (N. M., VIII 2) 1933.

After January 1, 1935 the legislature may by two-thirds vote limit the amount of ad valorem taxes which may be imposed upon real or personal property for local purposes. Should a deficiency in revenue result,

the legislature shall provide for the raising of additional revenue in any manner not forbidden by the Constitution. (Cal., XI 20, XIII 15) 1933.

Prohibition against any county, municipality or other subdivision levying taxes to produce a revenue which is more than 6% greater than that of the preceding year (except for the payment of interest or principal on bonded indebtedness or if specially authorized by the voters) is changed to forbid taxes raising such a revenue which is more than 6% greater than the revenue of any of the 3 preceding years. (Ore., XI 11) 1932.

Taxation: Exemptions. Athletic or physical culture clubs, organized on a non-profit basis, with well-equipped gymnasiums, membership of over 1,000, and junior classes, are exempted from state or local taxation. (La., X 4) 1932.

Period in which vessels of more than 50 tons registered at any port in the state are exempt from taxation extended from 1935 to 1955. (Cal., XIII 4).

The property of veterans who have continued in the service of the United States after their war service exempted from taxation up to $1,000. (Cal., XIII 1¼) 1932.

Three thousand dollars of the value of residence homesteads is to be exempted from taxation for state purposes, except for that proportion of state ad valorem taxes remitted to the county before a certification by the governing body of the county that such remission is no longer necessary. (By the amendment adopted in 1932 this exemption was granted except in counties receiving a remission of state taxes.) (Tex., VIII 1a) 1933.

Household goods are to be exempted from ad valorem taxation to the extent of $200 of their value. (W. Va., X 1) 1932.

Taxation: Assessment and Collection. All property shall be assessed at its full cash value. (Cal., XI 12) 1933.

Property damaged by earthquake after March 10, 1933 shall be assessed for 1933 taxes at its value after the damage was done. (Cal., XIII 8a) 1933.

Property sold for tax delinquency may be redeemed within 3 years, instead of 1 year, from time of sale. A penalty of 5% plus interest at 1% per month is substituted for a penalty of 20% and no interest. If the purchaser serves no notice at the expiration of the redemption period the sale may for cause shown be set aside within 5, instead of 3 years. The legislature is authorized to postpone the payment of taxes in case of public calamity, and may make loans to the extent of the deficiency in revenue so caused to the governing body of the parish where the calamity befalls. (La., X 11) 1932.

Legislature empowered to release the liability for taxes 10 years overdue. (Tex., III 55) 1932.

The legislature is empowered to provide that taxes should conclusively be presumed to have been paid 30 years after the time the tax becomes a lien, unless the property shall have been sold in the manner provided by law. (Cal., IV 31b) 1932.

Taxation: Uniformity. Provision that taxation shall be equal and uniform changed to impose a maximum rate of ad valorem taxation as follows: personal property employed in agriculture, 50 cents per $100; property used for residential or farm purposes, $1 per $100; situated outside of municipalities, $1.50 per $100; situated inside of municipalities, $2 per $100. These maxima may be increased, but not over 50% or for a period longer than 3 years, by a 60% vote of the taxing district upon submission of the proposition by the legislature. (W. Va., X 1) 1932.

Provision that the legislature might tax intangible property at a rate different but no higher than that on other property, the rate to be changed only by a two-thirds vote in each house, modified to permit classification of all personal property on a two-thirds vote in each house. The total tax imposed upon intangible property shall not be at a rate of more than 0.4% of its actual value, nor shall personal property be taxed more heavily than real property. The legislature may exempt any or all types of personal property from taxation. Effective January 1, 1935. (Cal., XIII 12½ repealed, XIII 14, 14½) 1933.

The total rate of taxation upon intangible personal property is never to exceed 0.5% of its actual value. (S. C., X 1) 1932.

Taxation: Income. The legislature shall have the power to tax net income from whatever source derived. The rate shall not exceed 5%, nor 3% for corporations. Exemptions of $1,500 for the single, and $3,000 for the married taxpayer, with $300 for each dependent child under 18. Employees of state and its subdivisions to be taxed at the same rate as other taxpayers. All income from such tax to be held in trust until all debts due on October 1, 1932 are paid and thereafter to be used exclusively for the reduction of ad valorem taxes. (Ala., XXII) 1933.

Taxes, which may be graduated and progressive, may be levied upon income from whatever source derived. (Kan., XI 2) 1932.

The legislature is authorized to provide for a graduated income tax and to specify exemptions therefrom. (W. Va., X 1) 1932.

Taxation: Inheritance. Provision eliminated that legislature might tax decedents' estates up to 2½% of their value, and the legislature may now tax inheritances and estates, such taxes not to exceed in the aggregate the amounts allowable as deductions from similar federal taxes. (Ala., XI 219 repealed, XXI) 1931.

Taxation: Specific Franchise and Excise Taxes. Severance tax on natural resources to be exclusive upon sulphur leases and rights and the additional value of land containing sulphur; formerly exclusive only for oil and gas. Not less than one-third of severance tax upon sulphur to be allocated to parish from which collected. (La., X 21) 1932.

Provision that banks, including national banks, should pay a tax upon net income, and corporations a franchise tax, equivalent to 4% of their net income is changed to permit the taxation of the income of banks at a rate provided by law and the franchises of corporations by any constitutional method. Provision retained that the bank tax is to be exclusive except for taxes upon real property. Any tax bill must be passed by two-thirds vote; formerly the rates could be varied by a two-thirds vote. Provision eliminated which provided for special taxation of intangible property owned by a corporation and for transmitting the proceeds of this tax to various political subdivisions; this change effective January 1, 1935. (Cal., XIII 16, 16½) 1933.

Provisions eliminated which fixed special rates of taxation for the property owned by each of the following types of companies: pipe line, canal, railroad, street railroad, car loaning, telegraph, telephone, gas and electric. The property is now to be taxed similarly to all other property (see the power to classify personal property, XII 14, under *Taxation: Uniformity*, above). Their franchises are to be taxed at the same rate as

other corporations. The tax of 1.5% upon the gross premiums of insurance companies collected in the state (minus returned premiums, reinsurance in California companies and local taxes paid upon real estate) is increased to 2.6%. A tax of 5% is substituted for the power of the legislature to fix the rate upon the profit made by marine insurance companies within the state (measured by gross premiums collected). Provisions retained which made the taxes upon insurance companies exclusive of all other taxes except those upon real property and which empowered the legislature to change the rate of taxation upon two-thirds vote. Effective January 1, 1935. (Cal., XIII 14, 14½; XIII 18 repealed) 1933.

Provisions eliminated which required the taxation at fixed rates of the gross receipts of bus companies and other motor carriers and the equal distribution of the proceeds for the support of the state and of the county highways. (Cal., XIII 15) 1933.

Provision that legislature might tax motor vehicles at a rate more onerous than that of other personal property, such tax to be in lieu of all other taxes except local wheelage taxes, modified to permit such taxation on companies whose gross earnings and right to use the highway is separately taxed. (Minn. XVI 3) 1932.

Waters. State to hold its rights to water power and water power sites in perpetuity. State authorized to control, develop or lease water power sites, to operate hydroelectric plants separately or in conjunction with the United States or any subdivision of the state, to distribute and sell electrical energy, and to fix the rates for the use of water and the sale of electricity. The credit of the state may be loaned or indebtedness incurred for this purpose up to 6% of the assessed value of property in the state. The necessary legislation shall provide for a board or commission of 3 members to be elected without regard to political affiliation. (Ore., XI-d 1-4) 1932.

THE FEDERAL BAR: A DECENTRALIZED SYSTEM OF ADMISSION AND DISBARMENT

Source of System in Judiciary Act of 1789—Federal Courts Practically Leave to the Various States the Determination of Educational Qualifications of Members of Their Bars—Some Anomalous Results in Cases of Federal Disbarment—Does U. S. Supreme Court's Judicial Power Include Control over Bars of Inferior Federal Courts?—Means of Establishing Uniform National Standard of Legal Education and Admission to Federal Bar, etc.

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I.

THE thirty-fifth section of the Judiciary Act of 1789,[1] indicative of a judicial system composed of courts independent of each other,[2] provided that each federal court should adopt rules governing admission of those who were to practice before it. This decentralized system of admission obtained in some of the colonies and therefore its adoption by Congress for the newly established federal courts was not an innovation.[3]

In 1790 the Supreme Court of the United States prescribed three years of membership in the bar of the supreme court of the state where the applicant resided as the prerequisite for admission to its bar.[4] This requirement is still in effect for that court.[5] The requirements of the ten circuit courts of appeal vary today, but include admission to the bar of the Supreme Court, or to the bar of a state supreme court, or to the bar of a federal district court.[6] The eighty-four federal district courts,[7] in general, require as a prerequisite merely membership in the bar of the state supreme court.[8] It is evident therefore that the federal courts have left to the states the determination of the educational qualifications of members of the federal bar.

II.

While the American Bar Association has, from its beginning,[9] sought to raise the standards of academic and legal education for admission to the bar, it apparently has considered that this should be done through state action without federal cooperation.

Some federal district courts, however, have been unwilling to rely on state standards in determining the educational requirements for admission to their bar. These federal courts have set standards higher than those of the bar of the state in which the district is located.

In 1804 a federal court in Pennsylvania prescribed as its standard three years of law study, admission for two years to the bar of a court of

1. Act of September 24, 1789, c. 20, Sec. 35, 1 Stat. 92; 28 U. S. C. A. Sec. 394.
2. Frankfurter and Landis, The Business of the Supreme Court (1928) 218. *Infra* note 59.
3. Reed, Training for the Public Profession of the Law (1921) 67-69.
4. No. 2, Rules and Orders of the Supreme Court, 1 Cranch xv; Warren, A History of the American Bar (1911) 242.
5. Rules for Admission to the Bar (West Publ. Co. 1934) 8.
6. Court Rules, 1-A Digest of U. S. Sup. Ct. Reports (Lawyers Co-op. Publ. Co. 1932) 77-79. See also Mason's Code, Supp. 2, p. 936.
7. 4 Fed. Supp. v-x (1934).
8. *Supra* note 5; 6 C. J. p. 575.
9. 2 Reports, American Bar Ass'n. (1879) 235; 55 *ibid.* (1930) 629.

common pleas and also admission to the bar of the state supreme court or else five years of law study and admission to the bar of the state supreme court.[10]

In 1877 the federal courts in Indiana, because of the constitutional provision of that state admitting to the practice all persons of "good moral character,"[11] required of applicants an examination unless they had been admitted to the supreme court bar of another state on examination or to the bar of a federal court in some other state.[12]

In 1934 a federal district court in Tennessee required the applicant to have had two years of prelegal training and two years of legal education and also to have been admitted to the bar of Tennessee, or of another state with equal requirements, for at least one year. During this one year period the applicant may be given a junior license. Apparently attorneys admitted to the bar of other federal courts must also comply with these requirements before admission to the bar of that court.[13] The rule of this federal district court adopts an educational standard higher than that set for admission to the state bar of Tennessee.[14]

If the federal district courts in those states with relatively low standards of legal education were to adopt a rule on admission embodying the recommendations of the American Bar Association on educational requirements,[15] the minimum educational requirements for members of the federal district court bars would be the same over the nation. But in those states having educational standards below those recommended by the American Bar Association some anomalous situations would come about.

An attorney in such a state, though not qualified for admission to the federal district bar, after three years of membership in the state supreme court bar would be eligible for admission to the bar of the Supreme Court of the United States and even before that would be eligible for the bar of some of the circuit courts of appeal.[16] It is apparent, therefore, that the efforts of individual federal district courts to raise the standards of legal education of the federal bar would not be as effective as might appear.

III.

In connection with the discussion of the decentralized system of admission to the bars of the several federal courts, a consideration of some anomalous results which have come about under a similar system of disbarment becomes pertinent.

Under the decentralized system the punishment or disbarment of an attorney by one federal court has no effect in other federal courts, as its orders are not operative in other courts.[17] Moreover, disbarment by a state court had no effect on the status in federal courts of the disbarred attorney.

Chief Justice Marshall in 1830 enrolled an attorney, who was applying for admission to the Supreme Court bar, even though his name had been stricken from the rolls of a federal district court in New York for contempt, as he had been a member of the bar of the highest court of that state for three years.[18]

A federal district court disbarred an attorney in 1898. At that time it pointed out that the attorney, though he had been disbarred in the state court seventeen years before, nevertheless had continued for the period to practice before the federal courts. The district judge stated that "when the highest court of a state has revoked an attorney's license to practice, it ought to follow, as a matter of course, that his license should be revoked in the federal courts of that state."[19]

An attorney, barred in 1912 from the courts of a state for professional misconduct, still held himself out as a practising lawyer, entitled to respect and confidence as such, as he had not lost his membership in the bar of the Supreme Court of the United States. Four years later a committee of a city bar association petitioned the Supreme Court to disbar him because of the prior disbarment by the state court.[20] It was such a situation which no doubt led the Supreme Court in 1925 to enter a rule governing the effect of state disbarment on the privilege to practice before that court.

In 1925 the Supreme Court of the United States adopted a rule on disbarment which provided that "where it is shown to the court that any member of its bar has been disbarred from practice in any state . . . or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court and unless . . . he shows good cause to the contrary within forty days, he will be disbarred."[21] Three of the circuit courts of appeal have adopted a similar rule in substance; in one of these three courts, disbarment in any court of record will result in disbarment in that court, while the other two circuit courts confine prior disbarment to state courts but do not include disbarment by a federal district court.[22]

It may be argued that the system of disbarment in federal courts is not a decentralized one in which each federal court controls disbarment by its own rules, as the final order or judgment in such proceedings is subject to review by superior federal courts. While the Supreme Court doubted at first if it had the power to review disbarment proceedings,[23] and some courts have denied that there is such a power,[24] such review is considered an exercise of appellate jurisdiction over the final orders or

10. 3 Works of James Wilson (Andrews ed. 1896) 248, n. 1. On admission to the Pennsylvania bar in 1804, see Reed, *loc. cit. supra* note 8.

11. I Thornton, Attorneys at Law (1914) 59; Gavit, Indiana's Constitution and Admission to the Bar (1930) 16 American Bar Ass'c. J. 595.

12. Reed, *op. cit. supra* note 8, 90, n. 2.

13. 20 American Bar Ass'c. J. (1934) 327. On a junior or interlocutory bar, see Reed, Annual Review of Legal Education (1929) 30.

14. Rules for Admission to the Bar (West Publ. Co. 1934) 140.

15. *Ibid.* vii; 8 American Bar Ass'c. J. (1922) 132.

16. *Infra* note 27.

17. In re Ulmer, 208 Fed. 461, 466 (N. D. Ohio 1913); In re Watt, 149 Fed. 1009 (C. C. Pa. 1907); 6 C. J. p. 582; 2 R. C. L. p. 1111, n. 19.

18. Ex parte Tillinghast, 4 Peters 108, 7 L. ed. 798 (1830). See also (1888) 95 Am. Dec. 343, note; (1888) 2 A. S. R. 861, note.

19. United States v. Green, 85 Fed. 857, 861 (C. C. Colo. 1898). In re Adair, 34 Fed. (2d) 663 (D. C. Del. 1929).

20. Selling v. Radford, 243 U. S. 46, 37 S. Ct. 377, 61 L. ed. 585 (1916).

21. No. 2, par. 5, Revised Rules of the Supreme Court, 28 U. S. C. A. p. 384 and Supp. p. 26.

22. *Supra* note 6. "The application of an attorney at law shall also state whether the applicant has ever been suspended or disbarred as an attorney in any court. . . ." Rules of Practice before the United States Board of Tax Appeals (1931) 1.

23. Ex parte Burr, 9 Wheat. 529, 530, 6 L. ed. 152 (1824). ". . . the Supreme Court, up and to and including its last enunciation, has held that neither appeal nor error lies from an order of disbarment, but that the only right of review exists, in a proceeding in the nature of mandamus raising the question whether or not judicial discretion was exercised in the order of removal." In re Ulmer, 208 Fed. 461, 467 (N. D. Ohio, 1913). *Cf.* Thatcher v. United States, 213 Fed. 801 (C. C. A. 6th 1914).

24. In McLaughlin v. The Judges of the District Court, 5 W. & S. 272 (Pa. 1843), the Supreme Court of Pennsylvania said that courts of record are vested with exclusive power to regulate the conduct of their own officers and that certiorari, appeal, mandamus nor any other

judgments of the lower federal courts.[25] This appellate review by the Supreme Court of disbarment proceedings in inferior federal courts is evidence that the exercise of judicial discretion by an inferior court in disbarment is not independent of control by a superior court. It is to be noted, however, that the Supreme Court has narrowly limited the scope of its review to the abuse of discretion by the lower court and has not asserted the power of prescribing rules governing disbarment in the inferior court.[26]

IV.

The thirty-fifth section of the Judiciary Act of 1789, by creating a decentralized system renders uncertain, in the absence of a concerted plan, any assurance of uniformity of policy with regard to educational requirements or disbarment. Since the present tendency is to meet existing problems by national action, the question arises as to whether the Supreme Court has, in the absence of congressional legislation, the power to adopt uniform rules governing admission and disbarment by the ninety-four inferior courts.

If the Supreme Court of the United States were to prescribe the minimum educational standards approved by the American Bar Association, both for its own bar and also the bars of all inferior federal courts, a graded bar would be created in those states having lower educational requirements. An attorney not able to comply with the minimum standard, though eligible for admission to some state bars, would be denied admission to the bar of federal courts. Thus in those states, with educational standards lower than those approved by the American Bar Association, there would be one group of lawyers with membership in only the state bar and another group privileged to practice in both federal and state courts.[27] Such a graded bar formerly existed in some of the eastern states but it was brought into existence by state not federal action.[28]

V.

But does the judicial power of the Supreme Court of the United States include control over the bars of the inferior federal courts; courts which Congress, under its constitutional authority, has established since 1789?

It has been said that the wide acceptance of the doctrine of the "inherent" power of the judiciary to control admission and disbarment is one of the most marked trends in recent judicial history and "as a result it may now be stated that it represents . . . the great weight of judicial opinion."[29]

Excerpts from two decisions will be set forth which lend strong support to the doctrine that each federal court possesses the "inherent"[30] power to control admission and disbarment;[31] a doctrine at variance with the view that "inherent" judicial power to control admission means the power of the Supreme Court to regulate admissions in the lower courts.

Chief Justice Taney, in an often cited passage, said that:

> "It has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor and for what cause he ought to be removed."[32]

This passage may be interpreted to mean that each federal court has the power to determine admission and disbarment of the members of its own bar[33] and that neither Congress nor any superior federal court can prescribe rules governing the inferior federal courts in such proceedings.[34]

A federal district court has stated that:

> "The thirty-fifth section of this Act [Judiciary Act of 1789] is a clear concession to the courts of exclusive jurisdiction over the subject of the admission of attorneys and counsellors to practice, and may, I think, be taken as an acknowledgment by Congress that this is a matter within the judicial power of the United States."[35]

This statement, and others in the opinion, while authority for the doctrine of the power of each court to control admission to its own bar, free from congressional interference, is not authority for the view that our federal court system is a unified one, in which the Supreme Court may exercise supervisory control, by it own rules, over admission to the bars of the ninety-four inferior federal courts.

It has been stated, however, that even in the absence of congressional legislation the Supreme Court of the United States has supervisory control over admission to the bars of inferior federal courts. The argument is that just as the creation by Congress of the inferior federal courts of itself invested these courts with judicial power over admission and disbarment, so the existence of a supreme court implies that such a body has the power of supervision over inferior courts.[36] If this argument be sound, then the Supreme Court by its own rules may abolish the decentralized system of admission and disbarment, which characterizes our federal

procedure was available for an attorney who had been stricken from the rolls of an inferior court. See also Ex parte Law, 35 Ga. 285, 289 (D. C. S. D. Ga. 1866).

25. On review of disbarment proceedings, see: 2 Thornton, *op. cit. supra* note 11, p. 1330, n. 6; 6 C. J. p. 610, n. 36; 38 C. J. p. 651, n. 4; 2 R. C. L. p. 1112; (1908) 10 Ann. Cas. 544, note.

26. Ex parte Bradley, 7 Wall. 364, 376, 19 L. ed. 214 (1868). *Supra* note 23; Ex parte Secombe, 19 How 9, 15 L. ed. 565 (1856).

27. Even for a case involving a federal question but which originated in a state court, an attorney unable to meet the prescribed standards, while qualified to appear before the highest court in the state, would not be qualified to appear before the Supreme Court of the United States if the case is reviewed by that body.

28. 4 Reports, American Bar Ass'c. (1881) 242, 258, 259. On graded, differentiated and unitary bars, see Reed, *op. cit. supra* note 3, 79; Arant, Cases on the American Bar and its Ethics (1933) 83.

29. Potts, Inadequacy of Disbarment Machinery (1934) 12 Tex. L. Rev. 127, 137.

See also Lee, Constitutional Power of the Courts over Admission to the Bar (1899) 13 Har. L. Rev. 233; Green, The Courts' Power over Admission and Disbarment (1923) 4 Tex. L. Rev. 1; Caulfield, Regulation of Practice of Law (1934) 5 Mo. Bar J. 101; Dodd, Cases on Constitutional Law (1932) 237, n. 19; Arant, *op. cit. supra* note 28, 9-39; (1929) 60 A. L. R. 851. *Cf.* Reed, *op. cit. supra* note 3, 38, 77; Reed, Annual Review of Legal Education (1930) 5; Beardsley, The Judicial Claim to Inherent Power over the Bar (1933) 19 American Bar Ass'c J. 509.

30. Cheadle, Inherent Power of the Judiciary over Admittance to the Bar (1932) 7 Wash. L. Rev. 318, 320.

31. For a criticism of the use of the concept "inherent power" with reference to courts created by statute, see Rule Making Power of Courts (1932) 21 Georgetown L. J. 352. See Frankfurter and Landis, Power to Regulate Contempts (1923) 37 Har. L. Rev. 1010, 1022 for an analysis of the concept "inherent power."

32. Ex parte Secombe, 19 How. 9, 13, 15 L. ed. 565 (1856). The petitioner sought a writ of mandamus to compel the judges of the territorial court, who disbarred him, to revoke their order.

On the use of mandamus to obtain admission to the bar, see Brackenridge v. Judges of the Court of Common Pleas, 1 S. & R. 187 (Pa. 1814).

33. This interpretation of the excerpt appeared in Ex parte Magruder, 6 Amer. L. Reg. (N. S.) 292, 296 (S. C. D. of Col. 1867).

34. "Admission to and continuance at the bar of the federal courts are not the subject of statutory regulation, but are governed wholly by rules which the several courts adopt and enforce in the exercise of powers inherent in their constitution." In re Thatcher, 190 Fed. 969, 976 (N. D. Ohio 1911), *aff'd.* 212 Fed. 801 (C. C. A. 6th 1914).

35. In re Shorter, 22 Fed. Cas. 16, 18, No. 12, 811 (D. C. Ala. 1865). This case involved the "test oath" statute. Act of Jan. 24, 1865, c. 20, 13 Stat. 424. *Infra* note 42.

36. ". . . it can be said that the exercise of our Supreme Court of supervisory authority over the conduct of inferior federal judges requires no other warrant in the Constitution than the grant to it of the supreme judicial power." Shartel, Federal Judges—Appointment, Suspension, and Removal (1929) 28 Mich. L. Rev. 723, 731. *Ibid.*, 732, n. 13.

See Index Digest of State Constitutions (1915) 415 for state constitutional provisions expressly conferring on the highest court supervisory control over lower courts.

court system, and adopt uniform rules governing the bars of inferior federal courts.

But the Supreme Court of the District of Columbia has stated[37] that each federal court has the sole and inherent common law power, confirmed by Congress,[38] to regulate the admission of attorneys to, and dismissal from, its bar. Such power, if any, as the Supreme Court of the United States possesses over admission and disbarment by an inferior court, it was also stated, comes only from its appellate jurisdiction, which is under congressional control.[39]

This obscure but interesting decision of the Supreme Court of the District of Columbia merits further consideration since it brings out the nature of the power of a federal court to regulate admission under a decentralized system.

The Supreme Court of the United States in March, 1865, amended its rule on admission[40] to conform to an act of Congress requiring a new oath for attorneys in federal courts.[41] The act of Congress was held unconstitutional in January, 1867, by a five to four vote, as being an *ex post facto* law.[42] The majority stated that its amended rule must be rescinded and it was so ordered.[43]

But the Supreme Court of the District of Columbia,[44] after this decision was rendered, rejected the application of an attorney who could not take a similar oath. This court refused to change its rule on admission, adopted prior to the passage of the test oath act but which embodied the provisions of the act,[45] because it was within its power to determine its own rules on admission. Even though the requirement was unconstitutional when in the form of an act of Congress, it was valid as a qualification for admission when prescribed by the rules of a court. Since the majority of the Supreme Court of the United States did not hold that the test oath act prescribed a qualification for admission, it rescinded its recently amended rule; but the Supreme Court of the District of Columbia refused to change its rule on admission which required the same oath.[45a]

The Supreme Court of the United States has said with regard to the doctrine of the judicial power of inferior federal courts:

"But it is contended that the statute[46] materially interferes with the inherent power of the courts and is invalid. That the power to punish for contempt is inherent in all courts, has many times been decided. . . . It is essential to the administration of justice. The courts of the United States when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it [the power to punish for contempt] is not beyond the power of Congress. . . ."[47]

This statement, while recognizing that the power of the Supreme Court of the United States to punish for contempt is free from congressional control,[48] does not affirm the view that the judicial power of inferior federal courts over contempt is immune from congressional legislation. If Congress may regulate the power of an inferior federal court to punish for contempt, a power considered vitally essential to the administration of justice, it would seem that it could also regulate admission and disbarment in inferior federal courts.[49]

If the judicial power of inferior federal courts over admission and disbarment is subject to congressional control, it would follow therefore that Congress, if it so desired, could terminate the decentralized system of admission and disbarment. As Congress has empowered the Supreme Court to make rules of procedure for inferior federal courts, so it should possess the power to enable the Supreme Court of the United States to exercise supervisory control over admissions and disbarments in these inferior federal courts.[50]

VI.

Despite the marked tendency to solve problems by national action, admission and disbarment by the federal courts are today, as in 1789, under the control of each court. And in turn, the rules on admission reflect the varying standards of the several states rather than a uniform national standard.

Assuming that it is a forward step to abandon the decentralized system of admission and disbarment and to substitute a unified system, then the means by which this can be accomplished become important. As has been pointed out the efforts of individual district courts offer little assurance of uniformity of standards or continuity of policy.

Since the Supreme Court has deferred in the past to congressional legislation regulating inferior federal courts, such as the thirty-fifth section of the Judiciary Act on admissions,[51] legislation on contempt of court,[52] and on regulation of procedure,[53] it is not likely that the Court will prescribe rules on admission and disbarment for inferior federal courts until congressional sanction has been given.[54]

It is problematical as to whether Congress will

37. Ex parte Magruder, 6 Amer. L. Reg. (N. S.) 292 (S. C. D. of Col. 1867).

38. This reference is no doubt to section thirty-five of the Judiciary Act of 1789, *supra* note 1, where is used the term "courts of the United States." This term should include the Supreme Court of the District of Columbia. For the history of courts in the District, see 5 Fed. Stat. Ann. (2d ed. 1917) 913.

39. On congressional control over appellate procedure, see *infra* note 50. See also *supra* notes 24 and 25.

40. Rule 2, General Rules, Law, 2 Wall. vii. *Supra* note 4.

41. Act of Jan. 24, 1865, c. 20, 13 Stat. 424.

42. Ex parte Garland, 4 Wall. 333, 18 L. ed. 366 (1867).

43. 4 Wall. vii.

44. *Supra* note 37.

45. Did the test oath of 1865, *supra* note 41, necessarily apply to the Supreme Court of the District of Columbia, since the act included only the Supreme Court of the United States, any circuit or district court of the United States, and the court of claims? On the status of courts of the District of Columbia see O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740, 77 L. ed. 1356. See also Notes (1933) 2 Geo. Wash. L. Rev. 84; (1933) 22 Georgetown L. J. 91.

45a. *Infra* note 48.

46. Act of Mar. 2, 1831, c. 99, 1 Stat. 487. *Infra* note 52.

47. Michaelson v. United States, 266 U. S. 42, 65, 45 S. Ct. 18, 69 L. ed. 162, 35 A. L. R. 451 (1934).

48. "The legislature may undoubtedly prescribe qualifications for the office, to which he (the attorney) must conform. . . . The question, in this case, is not as to the power to prescribe qualifications, but whether the power has been exercised as a means for the infliction of punishment. . . ." Ex parte Garland, 4 Wall. 333, 379, 18 L. ed. 366 (1867). Reed, Annual Review of Legal Education (1930) 8, n. 1; 6 C. J. p. 572, n. 63. *Infra* note 54.

49. Ex parte Robinson, 19 Wall. 505, 510, 22 L. ed. 205 (1873); Hertz v. United States 18 Fed. (2d) 52, 54 (C. C. A. 8th 1927). *Cf.* 2 R. C. L. pp. 941-942.

50. Reed, Annual Review of Legal Education (1930) 8, 11; Hoopes v. Bradshaw, 231 Pa. 485, 80 Atl. 1098 (1911).

For congressional control over the scope of the original jurisdiction of federal district courts and the appellate jurisdiction of the Supreme Court, see Waterman, The Nationalism of Swift v. Tyson (1933) 11 N. C. L. Rev. 125, 130; Rose, Federal Jurisdiction and Procedure (4th ed. 1931) Sec. 24; Beard, The American Leviathan (1930) 110.

51. *Supra* notes 1 and 40.

52. Act of September 24, 1789, c. 20, Sec. 17, 1 Stat. 83; *supra* note 46; 28 U. S. C. A. Sec. 385; 29 U. S. C. A. Sec. 111; Dodd. Cases on Constitutional Law (1932) 240 n. 20; Dobie, Federal Procedure (1928) Sec. 167; Nelles and King, Contempt by Publication (1928) 28 Col. L. Rev. 401, 422.

53. For congressional legislation in 1789 conferring on the Supreme Court power to adopt equity and admiralty rules governing procedure in inferior federal courts, see 28 U. S. C. A. Sec. 723. See also Report of Committee on Uniform Judicial Procedure, 55 Reports, American Bar Ass'n. (1930) 542-548.

54. ". . . despite what the courts may claim as to their exclusive power, the fact remains that the legislatures of perhaps all jurisdictions have legislated on the subject and some deference at least has been given such legislation by the courts in all such instances." Green, *op. cit. supra* note 29, 17.

See also Potts, Trial by Jury in Disbarment Proceedings (1932) 9 Tex. L. Rev. 28, 42; Shanfield, The Scope of Judicial Independence of the Legislature in Matters of Procedure and Control of the Bar (1933) 19 St. Louis L. Rev. 165, 173-174; 2 R. C. L. p. 942; (1930) 66 A. L. R. 1512, note.

soon empower the Supreme Court to formulate uniform rules on admission and disbarment. The recent statute authorizing the Supreme Court to prescribe rules of procedure in actions at law for federal district courts,[55] thereby abolishing conformity to state practice which has obtained since 1789,[56] while evidence of congressional approval of national uniformity in procedure at law and of supervisory control over the district courts, was enacted only after many years of effort.[57]

The Federal Judicial Conference,[58] created by Congress in 1922, composed of the Chief Justice of the Supreme Court and the senior circuit judge of each circuit, may be a means whereby some of the undesirable results arising from a decentralized system of admission and disbarment can be eliminated, with some expedition and without the necessity of congressional action.

Inasmuch as the purpose of creating the Federal Judicial Conference was to secure judicial administration in our federal judiciary under a unified court system, in contrast to the system of independent courts which has existed since 1789,[59] the Conference may deem it within its province to formulate uniform rules on admission and disbarment. Since the act creating the Judicial Conference provides that it "shall submit suggestions to the various courts as may seem in the interest of uniformity,"[60] it might recommend to the ten circuit courts of appeal and to the eighty-four district courts that they adopt these uniform rules on admission and disbarment.[61] It has been said that "though the functions of this body consist primarily in the assignment of judges in order to equalize the load of work . . . and to consider improvements in judicial procedure, its creation affords an agency that can be made use of for general administrative purposes."[62]

If the Judicial Conference were to prepare uniform rules on disbarment, and recommend their adoption, it seems plausible to assume that many of the federal courts would accept these recommendations and substitute them for their present rules. The uniform rule on admission to the federal bar need be only that of a minimum educational requirement, as approved by the American Bar Association, and need not be adopted by those federal courts where rules now require higher educational standards.

Such a recommendation on admission, for applicants in the future, if adopted as the rule of the Supreme Court of the United States, of the ten circuit courts of appeal, and of the federal district courts in those states with relatively low standards of legal education, would result in a nationally uniform minimum standard of legal education for the federal bar.

Though it may be a matter of dispute as to the means by which is to be brought into existence a uniform minimum national standard of legal education for admission to the federal bar and uniform rules on disbarment, it is important to remember that:

"Our American system of a federal judiciary, separated from that of the states, contains possibilities of organic differentiation [of the bar] that we have hardly begun to realize."[63]

55. Sunderland, The Grant of Rule-Making Power to the Supreme Court of the United States (1934) 32 Mich. L. Rev. 1116; 20 American Bar Ass'c. J. (1934) 395. See also Pound, The Rule-Making Power of the Courts (1926) 12 American Bar Ass'c. J. 602.

56. 28 U. S. C. A. Sec. 724; C. & N. W. Ry. v. Kendall, 167 Fed. 62, 65 (C. C. A. 8th 1909).

57. The movement for uniform rules of procedure at law in federal courts began in 1910. 51 Reports, American Bar Ass'c. (1926) 519. For an earlier movement see: Reynolds, A National Code of Procedure (1887) 21 American Law Rev. 195, 202; Warren, Federal Process and State Legislation (1929) 16 Va. L. Rev. 546, 567.

58. Frankfurter and Landis, *op. cit. supra* note 2, 241; Willoughby, Principles of Judicial Administration (1929) 275.

59. "Until 1922, the district courts, and likewise the circuit courts of appeal, were virtually independent units, without a supervising or unifying head." Ogg and Ray, American Government (2d ed. 1926) 419. See also Potts, Unification of the Judiciary (1923) 2 Tex. L. Rev. 445.

60. 28 U. S. C. A. Sec. 218.

61. *Cf.* Report of Federal Judicial Conference (1930) 16 American Bar Ass'c. J. 693, 695.

62. Langeluttig, The Department of Justice (1927) 179.

63. Reed, Training for the Bar, 136 Annals of American Academy of Political and Social Science (1928) 152, 154.
See also Frankfurter and Landis, *op. cit. supra* note 2, 315-318, on the need of a well trained federal bar.

Arrangements for Annual Meeting at Los Angeles

HEADQUARTERS: BILTMORE HOTEL

Hotel accommodations, all with bath, are available as follows:

	Single for one person	Double (Dble. bed for two persons)	Twin beds for two persons	Parlor Suites
Biltmore Hotel	$3.50 to $6.00	$5.00 to $7.00	$5 to $ 9	$10, 12, 15
Ambassador	5.00 to 7.00		7 to 11	18 to 22
Clark Hotel	2.50 to 3.00	3.50 to 4.00		7 to 15
Hayward Hotel	2.00 to 5.00	3.00 to 7.00		
Mayflower Hotel	2.50 to 3.50	2.50 to 3.50		
Rosslyn Hotel	2.50	3.50	4 & 5	10
Savoy Hotel	2.50 to 3.50	2.50 to 3.50		

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one* person. A double room contains a double bed to be occupied by *two* persons.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Reservations should be made as early as possible. Requests should be addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.

National Conference of Commissioners on Uniform State Laws

The next Annual Meeting of the Conference will be held at the Biltmore Hotel, Los Angeles, California, beginning Tuesday, July 9, 1935.

Applications for hotel reservations should be made to the Executive Secretary of the American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

PROGRESS ON THE NATIONAL BAR PROGRAM

THE possibilities of accomplishment on the National Bar Program subjects are vividly illustrated by the recent election in California, where four amendments to the constitution were passed. Three of these dealt directly with criminal law and the fourth with the selection of judges. The latter, however, was included in all the campaign literature as one of the initiative proposals to curb crime and its passage was probably due to its inclusion along with the other crime measures.

Many bar associations, although favoring some changes in their method of choosing the judiciary, have felt this was a hopeless cause because it required a constitutional amendment. The striking example we have just had from California shows that an amendment of this kind can be put through. A committee of the California Bar was very active in pushing these amendments and cooperated with the state Chamber of Commerce, the League of Women Voters, the State Federation of Women's Clubs and the Commonwealth Club of San Francisco in advocating them. The Advisory Committee of the California Committee on Better Administration of Law, which did much of the organization work was composed entirely of lawyers who have taken a prominent part in the State Bar of California.

The first topic on the National Bar Program, Criminal Law and Its Enforcement, has received considerable attention from bar associations of the country. It is fortunate that this is the case because we are in a better position to secure action at this time than we have been for many years. The public psychology is now such that it will support any measures which it is reasonably assured will tend to suppress the crime menace. With the Attorney General's Crime Conference meeting in Washington on December 10-13, including as official delegates, among others, representatives from the American Bar Association and every state bar association in the country, there is going to be a further focusing of public attention on this problem. Forty-four legislatures meet in 1935, and if our bar associations are ready with a constructive program to present them, that program will meet with the same success as the constitutional amendments in California.

The American Bar Association outlined at its Milwaukee meeting some immediate steps which those who have studied criminal law intensively believe will be of material benefit in the present situation. One of these is the creation of a State Department of Justice, with the Attorney General at the head of all law enforcing agencies in the state and responsible for law enforcement in the state. Judge Beasly's article in this issue of the JOURNAL explains the need of this provision in California, and what improvements it is expected to bring about.

Another recommendation concerned criminal procedure. In this field we already have the advantage of a carefully worked out program in the American Law Institute Code. While improvements in procedure will not of themselves solve the crime problem, there can be no doubt of their importance as an integral part of any permanent solution, nor can there be doubt that this is the particular province which is the direct and inescapable responsibility of the lawyers.

The number of states which since 1930 have adopted parts of the Code, as reported by the Director of the Institute, is 14. We have the opportunity during the coming legislative sessions to double that figure. An adoption of the Code as it stands, without mature consideration, is not urged, but a careful study of its provisions and their applicability in any particular state will undoubtedly yield a number of recommendations for the improvement of criminal procedure. Bar associations which do not press for the adoption of such a program are losing an opportunity which lies open before them.

Almost 500 committees, the names of whose members are on file with the American Bar Association, are working actively on National Bar Program subjects. Communication has been established directly with these committees and suggestions are being furnished to them as to work within their scope which needs to be done. Considerable interest is being shown in Legal Education and Admissions to the Bar, and the addition of five more states last year to the rapidly growing group requiring two years of college education or its equivalent as a requirement for taking the bar examinations, is a further instance of the possibilities of concrete accomplishments through bar association efforts. The study of methods of admission to the bar is receiving attention in some quarters, both in the way of an inquiry into bar examination technique and results, and also along the lines of a suggestion which has been made by Dean Green of the Northwestern Law School that a candidate's past record and experience as well as his bar examination should have weight in determining the question of his admission. A survey of methods of investigating character used by the various states has been made by the National Conference of Bar Examiners, and there are some states which are now considering a probationary or temporary admission such as was recently adopted in New Mexico, in order to give a period of time after the attorney has actually started to practice, in which to find out more about his morals in action.

A summary of methods of disciplinary procedure now in use is being made up and will be available for distribution within a few weeks, as well as the Handbook on Judicial Selection which is being prepared by Prof. Evan Haynes of the University of California.*

A very successful session on methods of choosing judges was held by the Cincinnati Bar Association during the past month, in which prominent Ohio, Illinois and Michigan lawyers spoke on various angles of this problem. An issue of the Cincinnati Law Review, containing the discussions is available from the American Bar Association on request.

While committees on the National Bar Program subjects are active in many places, the fundamental objective behind the coordination plan of producing a closer knit bar is not being neglected. The Coordination Committee is continuing to give this matter close study and a few associations have appointed committees to consider and give their views on the type of formal connection or relationship between local, state and national bar associations which will be of greatest advantage to the profession. Out of this discussion and consideration, it is confidently expected that a plan will be evolved for a more permanent type of union between the different classes of bar organizations.

WILL SHAFROTH,
Assistant to the President.

*The Handbook is to be distributed at the cost price of $1.00.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR
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THE COMING CRIME CONFERENCE

The fact that the American Bar Association will be represented at the Crime Conference called by Attorney General Cummings by a delegation headed by President Loftin is sufficient evidence of the importance which it attaches to the undertaking.

For many years, through its Section on Criminal Law, the Association has been doing its part to improve the administration of criminal justice. More recently, in outlining its coordination program, it gave first place on the list of subjects for discussion and action to the enforcement of the criminal law. And at the Milwaukee meeting it made specific recommendations which constituted a genuinely constructive program.

The Crime Conference should serve to focus the attention of the public and the legislators not only on the various aspects of the crime problem which demand further study but also on such proposed reforms as have received general acceptance from those in a position to give an opinion on the subject, and as to which the need at present is for action rather than prolonged consideration. It should be able to give them a moral momentum which will go far toward getting them through many legislatures which would otherwise remain indifferent or unimpressed.

When we consider that a large majority of the State Legislatures will meet next year the timeliness of the Conference becomes apparent. It was no doubt with a view to the possible effect of its recommendations on State Legislatures that the Attorney General called the Conference just at this time. For he recognizes, and has often stated, that the major part of the problem of enforcement of criminal law rests with the States and that the field of the Federal Government is constitutionally limited. Moreover, he has already secured from Congress all the legislation which he has requested.

We do not mean that the Crime Conference will not discuss many aspects of the national crime problem as to which no immediate and final recommendation may be made. Such discussion should serve to clarify the problems and advance them further on the road to a satisfactory solution. But in view of Attorney General Cummings' record, it is fairly safe to assume that there will come out of the Conference recommendations for prompt action in directions where it seems particularly needed.

THE WELFARE OF THE BAR

The recent report of the Missouri State Bar Association's Committee on the Welfare of the Bar, referred to in another part of this issue, is a further illustration of the increasing attention which these organizations are paying to the economic situation of the profession.

That committee sent out a questionnaire to all the members of the Missouri State Bar Association designed to bring out the facts and to suggest remedies, if any were needed. Although a relatively small percentage of the lawyers responded, still there were enough replies, in the opinion of the committee, to justify some conclusions and recommendations.

One of the questions asked was "How many lawyers, in your opinion, are necessary to handle the law business in your community satisfactorily?" The composite opinion of those answering showed that 55% of those now practicing could satisfactorily attend to all the business. The committee regards this answer as one of the most significant revelations of the entire survey and recommends that special study be given to the serious condition of overcrowding which exists. It further suggests that it is but just that those who are considering the law as a profession should know that those engaged in the practice find that there are at present more licensed lawyers than their communities can absorb.

Another question was as to the average income of the lawyers for the five-year pe-

riod from 1929 to 1933 inclusive. The replies naturally showed some diminution on the whole, particularly in the higher ranges. Still another question was designed to bring out the prevailing minimum fees in the various communities and the Bar's opinion as to what they should be in the case of clients who were able to pay a fair compensation. The statistics on this point were sufficiently persuasive to lead the committee to recommend that it be directed to prepare and submit to the membership of the Association, for consideration and approval, a proposed schedule of minimum fees for those classes of services lending themselves to such treatment.

However, the committee did not interpret the "Welfare of the Bar" as meaning the financial interest of the profession alone. There are plenty of evidences throughout the report that it realized that the true welfare of the Bar will be best secured by a discharge of its responsibility to the public. In line with this idea is the recommendation "that in the interest of lawyers and the public, this committee be directed to study and make definite recommendations for the dispatch of litigation."

The replies to the questionnaire convinced the committee that the lawyers of the State believed that the Association should devote a good deal of its attention to the practical professional problems of lawyers, and it accordingly recommended that there be a permanent standing committee on the Welfare of the Bar—which recommendation was adopted. In the November issue of the JOURNAL we told of what the New York County Lawyers' Association, the Idaho State Bar and the Association of the Bar of the City of Boston were doing in this direction. It is evident that this aspect of the lawyer's work is destined—and properly so—to receive increasing attention.

AN EXTRAORDINARY BAR INTEGRATION BILL

An examination of the State Bar Act recently passed by the Louisiana Legislature shows a plain provision for a political Board of Governors. That body is to be composed of one member from each congressional district, nominated at the regular party primaries, as now provided by law, and elected at the regular congressional election by the people. In other words, candidates for the governing body are to run with a party label and the nomination and election are likely to be determined by political considerations which have nothing to do either with their duties or capacities.

Once elected, this political Board is the controlling body. It has power to appoint such committees, officers and employes as it sees fit and to pay salaries and necessary expenses. It has power to formulate rules of professional conduct for all members of the Bar in the State, to receive and investigate complaints and to make findings and recommendations to the legally constituted "disbarment authorities." It has power to make disbursements from the funds of the State Bar and to pay all necessary expenses for effectuating the purposes of the Act. It is vested with "exclusive authority to prescribe rules and qualifications for admission to the Bar in Louisiana," subject to the reservation that it "shall not prescribe a higher general educational qualification than a high school course or the equivalent thereof."

The members of the first Board of Governors are to be appointed by the Governor, by and with the advice and consent of the Senate, and vacancies are to be filled in the same way. They are not to receive any pecuniary compensation for services other than necessary expenses connected with the performance of their duties. Candidates for this position must file an affidavit "disclosing the names of private corporations, if any, for which the said candidate has been attorney, with emoluments received, for a period of five years previous to date of said declaration of intention" to become a candidate.

The two main features of this extraordinary Bar bill are of course the plan to make a political body out of the State Bar Board and the attempt to confer on that Board the "exclusive authority" to prescribe the rules for the admission and the qualifications of the officers of the Supreme Court. In these respects the measure of course differs materially from the California State Bar Act, long the pioneer and model in this field.

Obvious objections will naturally occur to anyone who reads this extraordinary measure. Its future adventures will be watched with interest by the Bar of the whole country.

Signed Articles

As one object of the American Bar Association Journal is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this Journal assume no responsibility for the opinions in signed articles, except to the extent of expressing the view by the fact of publication, that the subject treated is one which merits attention.

REVIEW OF RECENT SUPREME COURT DECISIONS

Privilege of Immunity from Arrest Conferred by the Constitution on Senators and Representatives Does Not Include Immunity from Service of Process—New York Milk Board's Order Fixing Minimum Prices to Producers Not Shown to Be Arbitrary by Mere Showing That Wholesaler Challenging Order Is Losing Money—Scope of Remedy Afforded by Writ of Habeas Corpus—Court Dismisses Certificate of Question from Circuit Court of Appeals as Failing to Meet Requirement That It Should Present Questions of Law and Not Mixed Questions of Law and Fact — Situs of Personal Property for State Inheritance Taxation — Merchant Marine Act of 1920 Liberally Construed

By Edgar Bronson Tolman*

Constitutional Law—Senatorial Immunity from Arrest

The privilege from arrest conferred on Senators and Representatives by Article I, Section 6 of the Constitution does not include immunity from the service of process.

Long v. Ansell, Adv. Op. 58; Sup. Ct. Rep. Vol. 55, p. 21.

This opinion, by Mr. Justice Brandeis, related to the extent of senatorial privilege from judicial process. Senator Long was served with a summons in the District of Columbia, in a libel suit, brought by the respondent, Samuel T. Ansell, a resident of the District. Asserting that the summons and service were invalid under Article I, Section 6, Clause 1 of the Constitution, because issued and effected during a session of Congress which he was attending, Senator Long appeared specially and moved to quash the summons and service. The District Supreme Court denied the motion, and the Court of Appeals affirmed. On certiorari, the Supreme Court unanimously affirmed the ruling.

In his opinion, Mr. Justice Brandeis pointed out that the constitutional privilege does not extend to immunity from service of process, and said:

> Senator Long contends that Article I, Section 6, Clause 1 of the Constitution, confers upon every member of Congress, while in attendance within the District, immunity in civil cases not only from arrest, but also from service of process. Neither the Senate, nor the House of Representatives, has ever asserted such a claim in behalf of its members. Clause 1 defines the extent of the immunity. Its language is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant. In Kimberly v. Butler, Fed. Cases No. 7, 777, Mr. Chief Justice Chase, sitting in the Circuit Court for the District of Maryland, held that the privilege was limited to exemption from arrest. . . . The courts of the District of Columbia, where the question has been raised from time to time since 1868, have consistently denied the immunity asserted. State cases passing on similar provisions so hold.
>
> History confirms the conclusion that the immunity is limited to arrest. The cases cited in support of the contrary view rest largely upon doubtful notions as to the historic privileges of members of Parliament before the enactment in 1770 of the statute of 10 George III, c. 50. That act declared that members of Parliament should be subject to civil process, provided that they were not "arrested or imprisoned." When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies.
>
> The constitutional privilege here asserted must not be confused with the common law rule that witnesses, suitors and their attorneys, while in attendance in connection with the conduct of one suit, are immune from service in another. That rule of practice is founded upon the needs of the court, not upon the convenience or preference of the individuals concerned. And the immunity conferred by the court is extended or withheld as judicial necessities require.

The case was argued by Mr. Seth W. Richardson for the petitioner.

State Statutes—New York Milk Control Act—Validity of Orders of Milk Control Board

Orders of the New York Milk Control Board, fixing the minimum prices which wholesalers shall pay to producers, are not shown to be arbitrary and in conflict with the Fourteenth Amendment by the mere showing that the wholesaler challenging the orders is operating its business at a loss under the prices fixed by the orders.

Hegeman Farms Corporation v. Baldwin et al., Adv. Op. 29; Sup. Ct. Rep. Vol. 55, p. 7.

This case involved a suit brought by the appellant for an injunction against enforcement of orders of the New York Milk Control Board limiting the price of milk. The appellant, a wholesale milk dealer, previously held a license to engage in the business, but, after notice and hearing, the Board revoked the license because of payments to producers below the minimum prices fixed by orders of the Board. The Board, by orders, has fixed the minimum prices at which milk may be sold to dealers and the minimum to be paid to producers for various classes of milk. The appellant challenges the orders as in violation of the Fourteenth Amendment.

The complaint was dismissed by a specially constituted district court of three judges, on motion of the appellees, after stipulation of certain facts. Since the facts stipulated did not enlarge the allegations of the bill, the principal question considered was whether the bill made out a cause of action. Holding that a cause of action was not made out, the Supreme Court, in an opinion by Mr. Justice Cardozo, reviewed the allegations of the bill in relation to the orders of the Board. In dealing with the allegations of the bill, Mr. Justice Cardozo emphasized that in substance it merely alleged that the appellant was operating at a loss. In this connection he said:

> For an understanding of the complainant's position both in its economic and in its legal aspects, the fact is of critical importance that there has been no attempt by the Board

*Assisted by James L. Homire.

to fix a maximum price in respect of any of the transactions subject to its regulatory power. What is fixed is a minimum only. None the less, the competition among dealers is so keen that in practice the legal minimum is the maximum that the appellant is able to charge. The "spread" between what must be paid to the producers and what can be collected from the customers is so small that it "is insufficient in amount to afford plaintiff a fair return on the present fair value of the properties devoted by it to its milk business less depreciation." This the bill and findings state. They tell us also that the properties have a value of more than $450,000. They do not tell us whether the appellant ran its business with reasonable efficiency when compared with others in its calling. They do not even tell us whether it was earning a fair return on its investment before the orders were adopted. The omission is the more significant because, according to official records, the "spread" has been increased, instead of being diminished, through the operation of control. . . For all that appears upon this record, a change of the minimum prices would avail the appellant nothing if a corresponding increase or reduction were allowed to its competitors. It might still be driven to the wall without the aid of a differential that would neutralize inequalities of capacity or power. If different minima would help, the pleading leaves us in the dark as to what those minima should be. There is no statement that a different selling price could be fixed with fairness to consumers, or a different purchasing price with fairness to producers. The appellant's grievance amounts to this, that it is operating at a loss, though other dealers more efficient or economical or better known to the public may be operating at a profit.

Upon this analysis, the bill was found insufficient, since no arbitrary or oppressive action by the Board was shown.

A bill of complaint so uncertain in aim and so meagre in particulars falls short of the standard of candor and precision set up by our decision. . . . True, the appellant is losing money under the orders now in force. For anything shown in the bill it was losing money before. For anything there shown other dealers at the same prices may now be earning profits; at all events they are content, or they would be led by self interest to raise the present level. We are unable to infer from these fragmentary data that there has been anything perverse or arbitrary in the action of the Board. To make the selling level higher might be unfair to the consumers; to make the purchasing level lower might bring ruin to producers. The appellant would have us say that minimum prices must be changed whenever a particular dealer can show that the effect of the schedule in its application to himself is to deprive him of a profit. This is not enough to subject administrative rulings to revision by the courts. If the designation of a minimum price is within the scope of the police power, expenses or losses made necessary thereby must be borne as an incident, unless the order goes so far beyond the needs of the occasion as to be turned into an act of tyranny. Nothing of the kind is charged. The Fourteenth Amendment does not protect a business against the hazards of competition. . . . It is from hazards of that order, and not from restraints of law capriciously imposed, that the appellant seeks relief. The refuge from its ills is not in constitutional immunities.

The opinion dealt also with a supposed analogy to the case of public utilities subjected to maximum rates that do not yield a fair return. Declaring that the analogy is unreal, MR JUSTICE CARDOZO said:

A public utility in such circumstances has no outlet of escape. If it is running its business with reasonable economy, it must break the law or bleed to death. But that is not the alternative offered where the law prescribes a minimum. An outlet is then available to the regulated business, an outlet that presumably will be utilized whenever use becomes expedient. If the price is not raised, the reason must be that efficient operators find that they can get along without a change. Either that must be so, or else, as was pointed out in the opinion below, the industry will perish. The bill does not suggest that such a catastrophe is imminent. True, of course, it is that the weaker members of the group (the marginal operators or even others above the margin) may find themselves unable to keep pace with the stronger, but it is their comparative inefficiency, not tyrannical compulsion, that makes them laggards in the race. Whether a wise statecraft will favor or condemn this exaltation of the strong is a matter of legislative policy with which courts are not concerned.

In conclusion, the Court observed that it did not appear that the appellant had availed itself of the administrative remedy provided by the statute, before resorting to suit.

MR. JUSTICE SUTHERLAND concurred in the result.

The case was argued by Mr. Leonard Acker for the appellant, and by Mr. Henry S. Manley for the appellees.

Habeas Corpus—Scope of Writ

A writ of habeas corpus may not be used as a substitute for appeal nor to secure judicial review of any question other than the legality of the prisoner's custody and his right to immediate release. It may not be invoked to modify or revise a sentence imposed on conviction on one count in an indictment, when the petitioner is lawfully imprisoned under sentences on other counts in the indictment which are admittedly valid.

McNally v. Hill, Adv. Op. 24; Sup. Ct. Rep. Vol. 55, p. 24.

In this opinion, by MR. JUSTICE STONE, the Court considered a question as to the scope of the remedy afforded by a writ of *habeas corpus*. The petitioner had been convicted on an indictment in three counts under the Conspiracy Act of May 17, 1879, and the National Motor Vehicle Theft Act of October 29, 1919. He was sentenced to a term of two years on the first count, and four years each on the second and third counts. The sentence on the first count was to run concurrently with that on the second, and the sentences on the second and third counts were to run consecutively. The sentence on the second count has not expired, and service of sentence on the third count has not yet begun.

In April, 1933, the petitioner filed a petition for a write of *habeas corpus* in a federal district court in Pennsylvania. He assailed the conviction and sentence on the third count as void, but made no attack on the conviction and sentence on the other two counts. The reasons advanced in support of the granting of the writ were that under the Parole Act the petitioner was eligible to apply for parole after serving one-third of his sentence; that he had served one-third or more of the valid sentence on the first two counts, but less than one-third of the total; and that consideration by the Parole Board of any application for parole was precluded by reason of the outstanding, but void, sentence on the third count.

The Circuit Court of Appeals examined the case on the merits, and held the sentence on the third count valid.

On certiorari, the Supreme Court affirmed the decree affirming the dismissal of the petition, but upon the ground that the writ could not be invoked as a substitute for an appeal from the judgment of conviction. As to the questions decided in the circuit court of appeals, MR. JUSTICE STONE said:

We find it unnecessary to consider the questions raised or decided below, which the petitioner presses here. We conclude that, as it appears from the petition that the detention of petitioner is lawful under the sentence on the second count, there is no occasion, in a *habeas corpus* proceeding, for inquiry into the validity of his conviction under the third.

The history and function of the writ were then discussed. It was pointed out that the use of the writ is recognized as an incident of federal judicial power in Article I, §9, Clause 2 of the Constitution, and that the Judiciary Act of 1789 expressly confers power to issue the writ. To ascertain the meaning of the term

habeas corpus and the appropriate use of the writ, examination of the common law was necessary. After referring to the origin of the writ as a means by which the superior courts of the common law and the chancellor sought to extend their jurisdiction and the definition and regulation of the writ in the Habeas Corpus Act of 1679, 31 Car. II, C. 2, MR. JUSTICE STONE said:

> The purpose of the proceeding defined by the statute was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail, and that only if his detention were found to be unlawful. In this, the statute conformed to the traditional form of the writ, which put in issue only the disposition of the custody of the prisoner according to law. There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, and no suggestion of such a use has been found in the commentaries on the English common law. Diligent search of the English authorities and the digests before 1789 has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release.
>
> Such use of the writ in the federal courts is without the support of history or of any language in the statutes which would indicate a purpose to enlarge its traditional function. Section 14 of the Judiciary Act, by the language already quoted, was at pains to declare that the writ might issue for the purpose of inquiring into the cause of restraint of liberty. Without restraint of liberty, the writ will not issue. . . . Equally, without restraint which is unlawful, the writ may not be used. A sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry.
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> Considerations which have led this Court to hold that *habeas corpus* may not be used as a writ of error to correct an erroneous judgment of conviction of crime, but may be resorted to only where the judgment is void because the court was without jurisdiction to render it, . . . lead to the like conclusion where the prisoner is lawfully detained under a sentence which is invalid in part. *Habeas corpus* may not be used to modify or revise the judgment of conviction. . . . Even when void, its operation may be stayed by *habeas corpus* only through the exercise of the authority of the court to remove the prisoner from custody. That authority cannot be exercised where the custody is lawful.

In conclusion, the Court pointed out that the petitioner seeks only a ruling to establish his eligibility for parole, because of the invalidity of the sentence on the third count, and that such ruling might be obtained by mandamus against the Parole Board.

The case was argued by Mr. Justin Miller for the respondent.

Appeals—Practice—Questions Certified

Questions certified to the Supreme Court for determination must be questions of law and not mixed questions of law and fact, must not invoke or imply conclusions or judgment by the Court upon the facts adduced in the cause, and must be distinct and definite.

Pflueger et al. vs. Sherman et al., Adv. Op. 62; Sup. Ct. Rep. Vol. 55, p. 10.

In a *per curiam* opinion in this case the Court discussed the requirement that questions certified to it for determination must be questions of law, and not mixed questions of law and fact. The opinion states that the circuit court of appeals made an extended recital of the allegations of the bill of complaint (copy of which, consisting of 73 printed pages, was attached to the certificate) and a recital of other proceedings had. After making such recitals the circuit court of appeals certified the question whether it had jurisdiction to hear and determine questions of law and fact involved in the decree from which the appeal was taken.

The Court, dismissing the certificate, found that it fails to conform to the requirement that questions certified must be questions of law, and not mixed questions of law and fact, and said:

> The question has been certified apparently in order to obtain the decision of several underlying questions, and in the view that the various proceedings, facts and circumstances detailed in the certificate must be examined by this Court to the end that it may determine what effect shall be given to certain "appearances and waivers" filed in the Circuit Court of Appeals, and what effect shall be given to a statement and withdrawal of counsel for certain parties before the entry of the decree against them in the District Court, and that the Court may also determine the nature of the suit, and whether, in the light of these determinations, summons and severance of those not parties to the appeal were necessary.
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> The certificate fails to conform to the requirement that questions submitted must be questions of law and not mixed questions of law and fact, and not such as involve or imply conclusions or judgment by the Court upon the effect of facts adduced in the cause, and must be distinct and definite. The Court cannot be called upon to answer questions of objectionable generality, or to review proceedings, facts and circumstances for the purpose of deciding a variety of preliminary questions in order to reach and decide an ultimate question submitted.

The case was argued by Mr. John Francis Neylan for the appellants and by Mr. W. H. Lawrence for the appellees.

Conflict of Laws—Situs of Personal Property—State Inheritance Taxes

Paintings owned by a resident of New York, but placed by him in a museum in Pennsylvania as their established abiding place, acquired a situs in Pennsylvania for purposes of the inheritance tax laws of the latter, despite the fact that the owner may have had an intention to remove the paintings to New York at some future time.

City Bank Farmers Trust Company v. Schnader, et al., Adv. Op. 68; Sup. Ct. Rep. Vol. 55, p. 29.

This case involved questions as to the situs, for inheritance tax purposes, of paintings owned by a resident of New York. At the time of the owner's death the paintings were on exhibition at a museum in Pennsylvania. The appellees, attorney general and secretary of revenue of Pennsylvania, proceeded to appraise and assess the pictures for the purpose of collecting the inheritance tax imposed by Pennsylvania laws on the personal property located in the state, but owned by a nonresident. The appellant, as trustee of the residuary estate which included the paintings, brought suit to enjoin enforcement of the tax, contending that at the time of the owner's death the paintings had no actual situs in Pennsylvania, and that the taxing statute, if construed to tax the transfer by the death of the nonresident owner, is in conflict with the due process clause of the Fourteenth Amendment. The New York tax commission appeared as *amicus curiae*, supporting the claim that the transfer is taxable in New York. The district court held the transfer subject to the Pennsylvania inheritance tax.

On appeal the decree was affirmed by the Supreme Court, in an opinion by MR. JUSTICE BUTLER. A summary of the findings disclosed that the pictures in question were loaned in March, 1928, to a museum in Pennsylvania, and remained there continuously until the owner's death in January, 1931, except a few which were exhibited for a short time in Virginia but were returned to Pennsylvania. The owner had the right to recall the paintings to New York at any time, in

fact did indicate in May, 1930, that the arrangement would terminate June 17, 1930. But at the request of the director of the museum, the pictures were allowed to remain at the museum, on the understanding that they would be returned to New York, on the owner's request.

Concluding that the paintings had an actual situs in Pennsylvania and were there subject to tax, MR. JUSTICE BUTLER called attention to the controlling facts and stated the applicable law, as follows:

> The significant features of the transaction are these: Prior to the loan the pictures that went to make up the collection had an actual situs in New York. The loan was not made for a short and definite period and it was subject to the right of the owner to have the pictures returned to New York at any time. He did not call for their return but with his consent they were kept in Pennsylvania and there exhibited until he died two years and ten months after the loan. With the exception of the four pictures temporarily sent to Virginia, none was taken from Pennsylvania. For nearly two years next preceding his death Clarke was willing—indeed, he authorized the director—to sell the collection to anyone who would buy at the specified price and donate them to the Pennsylvania museum. And during the last six months of his life he was willing to sell to any purchaser that would give them to any institution similar to the Pennsylvania museum. It does not appear that Clarke ever intended to have the pictures returned to New York at any definite date or upon the happening of any event or at all. Until his death he permitted the pictures to be kept and used in the Pennsylvania museum merely subject to his right at any time to order them taken to New York or elsewhere.
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> In respect of situs for taxation, the collection of portraits is quite unlike vessels and railway rolling stock that in fulfilling the purpose for which they are created move from place to place and into different States. . . . Before the loan was made the pictures had an actual situs in New York, so as to be within the taxing power of that State, though it cannot be said that they were there permanently located in the sense of that phrase when used in respect of land, buildings or other items of fixed real property. The location of the portraits in Pennsylvania was not merely transient, transitory or temporary but it was fixed in an established abiding place in which they remained for a long time. Undoubtedly, they became subject to the taxing power of the State. . . . By sending them into Pennsylvania and by his omission to have them returned to New York and his lack of definite intention ever so to do Clarke failed to maintain an actual situs in New York and created one for them in Pennsylvania.

The case was argued by Mr. Henry S. Drinker, Jr., for the appellant, and by Mr. William A. Schnader, Atty.-Gen. of Pa., for the appellee.

Admiralty—Merchant Marine Act of 1920—Construction

The master of a tug-boat is a seaman within the meaning of Section 33 of the Merchant Marine Act of 1920.

Warner v. Goltra, Adv. Op. 8; Sup. Ct. Rep. Vol. 55, p. 46.

This opinion, by MR. JUSTICE CARDOZO, related to the construction of §33 of the Merchant Marine Act of 1920, and particularly to the question whether the "master" of a vessel is a "seaman" within the meaning of that statute. The petitioner was the personal representative of the master of a tug-boat, who met his death on the Ohio River through the negligence of a pilot employed to navigate the tug. The trial court sustained a demurrer to the complaint in a suit to recover damages, on the ground that a "master" is not a "seaman" within the meaning of the statute. The Supreme Court of Missouri affirmed the judgment.

On certiorari the Supreme Court reversed the judgment, holding that the master of the tug was a seaman and within the protection of the Act. In dealing with the case the previous liberal construction of the Act was emphasized.

> The statute is set forth at large in opinions of this Court. . . . It gives to "any seaman" injured in the course of his employment, and in case of the death of such seaman to his personal representatives, a cause of action similar to that given by the statutes of the United States to railway employees. In the enforcement of the statute a policy of liberal construction announced at the beginning has been steadily maintained. Early in the history of the act, the question came up whether it gave a remedy to stevedores. We decided that it did. "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'". . . . None the less, verbal niceties were bent to the overmastering purpose of the act to give protection to workers injured upon ships. "Words," we said, "are flexible." Later decisions of this Court have been conceived in a like spirit (citing cases) and other courts have followed suit.

Reference was then made to other statutes, some in which the term "seaman" is held to include the master, and some in which it is held to exclude the master, depending on the context and on the purpose of the law. Observing that such cases are not controlling, the learned Justice concluded that the exclusion of the master from the remedies conferred by the Act would defeat, in part, the purpose of the Act. The purpose of the Act and the proper construction to effect such purpose were thus stated:

> Congress knew that men employed upon a ship were without a remedy in damages for negligence beyond their cure and maintenance, unless the injury was a consequence of the unseaworthiness of the ship or a defect in her equipment. . . . This restriction upon remedies was applicable to ordinary seamen, but applicable also to officers and even to the master. . . . "It is said, that the allowance by the maritime law belongs to the seamen only, and cannot be claimed by the master of the ship. . . . No authority is cited for this position; and I am not aware that any exists." Story, J., in *The Brig George* (1 Sumn, 151) at p. 155. The old measure of recovery was the same for all aboard, the highest and the lowest. The new measure was not designed to narrow the protected class while broadening the damages. We stick too closely to the letter if we say that Congress had the will to give damages for wounds or death to the crew at large or their dependents and to leave the master and his dependents out. An ancient evil was to be uprooted, and uprooted altogether. It was not to be left with fibres still clinging to the soil.

The history of the Act was also reviewed to give added clearness to the purpose evident in the terms of the statute. In this connection the forerunner of Section 33 was cited, as well as the provisions of the Longshoremen's and Harbor Workers' Compensation Act. It was pointed out that Section 33 was derived from Section 20 of the Act of 1915, and that the earlier provision had recognized that masters were within the genus seamen. The Court declared that it could not "believe that in this process of amendment the word seaman lost the broad meaning that it had in the law to be amended, and was narrowed by the exclusion of a particular species of seaman, i.e., seamen having command."

The Longshoremen's and Harbor Workers' Compensation Act, the Court added, was adopted in 1927 and expressly excludes from its coverage "a master or member of a crew of any vessel." This exclusion was made at the request of seamen who notified the committee in charge that they preferred the remedy of the Act of 1920. There could be little doubt that Congress made the exclusion in the Compensation Act in the belief that the Merchant Marine Act gave adequate protection to the master and the crew alike, in case of injury or death.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

"LIBERTY *Under Law and Administration.*" By Homer Cummings, Attorney General of the United States. 1934. New York: Scribner. 136 pages.—"Administration," in Mr. Cummings' sense, is the functioning of that "hierarchy of officials" which according to a famous definition of Dean Pound's "achieves public security by preventive measures" as distinguished from law which operates by redress or punishment. Dean Pound adds that administration "is governed by ends rather than rules. It is personal. Hence it is often arbitrary." It is on this ground that the widespread and constant public demand for an ever-increasing measure of administration is accompanied by an equally widespread and increasing distrust of the mechanism by which administration is carried on. We cannot do without "preventive measures" and yet we hate ourselves for having to invoke them so constantly.

The importance of the Attorney General's book, which greatly exceeds its bulk, lies in his faith that the personal and arbitrary features of the functioning of the administrative mechanism can be, and are being, more and more mitigated by the development in the administrative agencies, in the exercise of their judicial or quasi-judicial authority, of "a legal system of their own." We could wish that he might have developed both the nature of and the grounds for this hope a little more fully than was possible in three short lectures. Does he conceive that the administrative agencies can be brought to recognize the need for consistency—consistency of past with present policies, consistency of the policies of one agency with those of another? "A legal system of their own" can surely have no other meaning than that, and yet are there any signs that such a system is coming into being? He refers to the administrative agencies as "non-political," but we have far to travel before that term can be applied to them in the sense in which it can be applied to the judiciary which has to make operative the dictates of formal law. Surely the most serious of all objections to them is that they are inevitably political, but are beyond the reach of the ordinary checks and responsibilities which restrain the actions of the legislative power.

Perhaps the key to, and the best justification of, Mr. Cummings' hopefulness is to be found in his view of the administrative services as a field for the employment of the educated and disinterested expert. "The point I stress," he declares, "is that these administrative agencies are the media through which the modern state can best call to its service that expert and specialized knowledge which today, far more than ever before, is the *sine qua non* of good government." He closes with a reference to "the long experience of continental Europe" in the evolving of "a more definitive system of administrative law than we now have." It should be just as possible, he says, "to delimit our rights" (the rights of the individual citizen) under a system of administrative law as "to have them defined indirectly" under the "rule of law" as known to the courts. He particularly admires the French administrative structure, and thinks there should not be "any real difficulty in working out a system of review, not unlike the French, and through it to find ways of controlling arbitrary discretion or to establish necessary means of attaining that certainty and uniformity of action which is the pride of the law." It might be pointed out here that the French national psychology, which is almost extravagantly respectful to any and every type of official, is profoundly different from the Anglo-Saxon and most particularly from the American, and is highly favorable to the growth of a well-trained and intelligent body of administrative officials with a strong *esprit de corps*, a tendency to lifelong service, and a willingness to support one another's decisions.

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"Administocracy: The Recovery Laws and Their Enforcement." By Guy S. Claire. 1934. New York: Macmillan. 50 cents.—Eighty-two pages of rapid and somewhat journalistic summary (without philosophic discussion) of the main legislative and administrative acts of the Roosevelt Administration to August, 1934, with 34 pages of the actual text of four of the chief measures. The attitude of the Supreme Court towards this legislation is briefly reviewed in the Introduction.

B. K. SANDWELL,

Toronto.

"Declaratory Judgments." By Edwin Borchard. 1934. Cleveland: Banks-Baldwin Publishing Co. Pp. xxii, 669.—An examination of this comprehensive, timely and scholarly work brings to memory the days when twenty years ago the author and this reviewer spent many evenings within the Library of Congress at Washington talking over laws, lawyers, and law making. We often reviewed the then nebulous idea of the declaratory judgment, just beginning to make its way to consideration by the Commissioners on Uniform State Laws, where the uniform statute evolved to be later approved by the American Bar Association. This statute is now law in 34 states and territories. Legal caution and conservatism have marked and accompanied this reform and its use.

The proposal was presented to Congress many years ago, strongly urged and ably advocated by many distinguished members of the bar. The law was favorably reported from committee from time to time but either active opposition or legislative inertia blocked its enactment. The last congressional com-

mittee hearing was had in May, 1928. Professor Borchard was there urging the passage of the law and pointing out that its successful progress then embraced the jurisprudence of many of the States of the Union. But even he seems to have despaired of congressional action for he sent his work of years on this subject, covering as it does, the history and case development of the principle in many countries of the world, and in our States, to his printers, who in May, 1934, announced its publication for June 1, 1934.

But the fates intervened in the persons of Representative Albert J. Montague of Virginia and Senator William H. King of Utah, who, having wiped the dust from the measure, introduced it into the 73d Congress, where so much new legislation was pending and being enacted, and successfully brought it to the desk of the President, who signed the measure on June 14, 1934; thus giving Professor Borchard, who had toiled so long to advance this judicial reform so much needed, an opportunity to include the text of the federal measure in his preface, dated June 15, 1934.

His book is thus complete. Whatever comes to much of other legislation by the last Congress, this measure will in time come to be known as the greatest advance in federal jurisprudence within the memory of living men.

The principle of the law traces back to Rome or earlier. It has been in successful use in Scotland for over 400 years and in England for almost a century. Thousands of cases have been determined under its principles, perhaps every one of them collected and cited in the mentioned volume. But the volume is not a "case-book." It fully measures up to a scholarly commentary, presenting and discussing the reasons and the practical application and use of the principle.

From the standpoint of the lawyer, this new Act and this volume are of singular importance at the present time when almost every citizen has almost daily occasion to consider his rights, obligations, and responsibilities under Federal statutes, many of them new and novel, and in the administration of which, there is expressed determination in some quarters to break with established methods of determination of the issues presented. Administrative agencies of government frequently take to themselves rather broad assumed authority both to make and construe law without appeal to the courts; frequently leaving the citizen in rather a luckless position. Speaking in 1911, an English Justice remarked:

"The convenience in the public interest is all in favor of providing a speedy and easy access to the courts for His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers of governmental departments and government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any court."

This English justice might have been describing present-day American administrative conditions.

It was written by the philosopher, Alexis de Tocqueville, a hundred years ago:

"The strength of the courts of law has ever been the greatest security which can be offered to personal independence; but this is more especially the case in democratic ages; private rights and interests are in constant danger, if the judicial power does not grow more extensive and more strong to keep pace with the growing equality of conditions."

We have at present a whole flock of administrative agencies, boards, commissions, and the like, all continually taking action or threatening action in cases which present all the necessary jurisdictional and other factors for "cases of actual controversy" to which this new statute is limited.

It has long been the lament of business men and their counsel: "Oh, for a place where we can be told in advance whether our contemplated action is lawful or not!"

This new law presents that opportunity, and Professor Borchard's book supplies the arguments and the background. The procedure is simple, direct, speedy and inexpensive.

With the federal government coming into direct relation with the citizen in an increasing multitude of situations, "cases of actual controversy" are and must be of frequent occurrence. As government always acts through agents, these agents, up to the Attorney General of the United States, will become appropriate parties respondent in actions to declare the respective rights of the citizen in his relation to his government under federal law. There will no longer be occasion such as existed for twenty years after the passage of the Sherman anti-trust law, to wait the pleasure of government departments or agencies to become stirred to bring suits against parties who may have been innocently proceeding on the advice of the best and most experienced counsel they could find. Government has the habit of picking its best case against the least valiant of defendants. This condition may now be reversed, the most valiant of plaintiffs may take his strongest case to the courts and require the defendant government official to respond to the facts and arguments thereby presented. The judgment of the court, subject to review, becomes res adjudicata.

Likewise, this method of approach to a judicial determination is available to government and to governmental officials. They need not wait to prosecute violations of laws; they may present the controversy to the court for a declaratory judgment thereon, thus speeding up that certainty of law, which is essential to good government.

The book is no less useful to the practitioner only interested in his local laws, but under present conditions all lawyers are interested in federal law.

Having obtained a declaration, it is to be presumed that the parties thereto will respect that determination, but the act provides that further relief may be had when necessary or proper. The initial inconveniences and pitfalls surrounding extraordinary legal remedies, such as mandamus, quo warranto, and injunction, whereby the litigant often becomes entangled in his own procedure, are thus to be avoided. The dangers, risks, losses, and penalties of proceeding without advance determination of legality are by this modern statute to be avoided.

To the Congress of the United States and to Professor Borchard both the bar and people are indebted for this most modern tool for efficient administration of governmental functions. For this most masterly commentary which rightly used will make this new law an aid to prompt justice Professor Borchard has made the entire bar his debtor.

The volume is excellently printed and contains a most comprehensive index, with tables of statutes and cases.

NATHAN BOONE WILLIAMS.
Washington, D. C.

The Parliamentary Powers of English Government Departments. By John Willis. 1933. Cambridge: Harvard University Press. Pp. 214.

Judicial Control of the Federal Trade Commission and Interstate Commerce Commission. By Carl McFarland. Cambridge: Harvard University Press. Pp. vii, 214.

The delegation of legislative power to administrative departments is not entirely new in either England or the United States. In England particularly there has been a period of slow growth, culminating possibly in the Housing Act of 1909 and the National Health Insurance Act of 1911. The development is of more recent origin in the United States, but it has clear expression in the Federal Trade Commission Act, in which power was left to the Commission not only to administer but to define the fields and terms for the administration.

Mr. Willis outlines in clear and specific terms the growth of delegated legislation in England. He also gives a fairly complete survey of the principal statutes under which rules of the departments have the effect of parliamentary enactment. The point is made by the author that in England control is either by the courts or by Parliament itself, there being no constitution such as there is in the United States. The review by courts is a somewhat different matter there than here. The questions covered by the courts are those of harmony with common law and the right of delegation itself. The conservative element is constantly attempting to get Parliament to reassert its control, in spite of which the general practice since the war has resulted in an enormous increase in the exercised power of the departments to make their own rules and even to modify parliamentary enactments.

One conclusion of the author is that despite any efforts to the contrary there is an irresistible development of bureaucratic control in all of the departmental fields. Parliament becomes pretty largely a board of governors outlining policy in the very broadest terms, and even broad policies may be, and are, set aside by department administrations. While no definite prediction is made, one gets the impression that the author believes Parliament to be rather a useless pettifogging affair with the destiny of the nation completely in the hands of the professional administrator.

> "Two theories of the relations of courts to administrative agencies are apparent in the writings of Anglo-American lawyers. One treats the justice dispensed by courts and the social control exercised by administrative tribunals as parts of a single system of law in which the courts wield ultimate authority. The other recognizes a dual system of public administration of justice and seeks a division of function between courts and administrative agencies so that some administrative determinations are final while others are subject to judicial supervision."

The experience of judicial control of the Federal Trade Commission and of the Interstate Commerce Commission furnish interesting chapters in this controversy. Mr. McFarland undertakes to trace the history of this control and point out some of the differences in the attitude of the courts to the two experiments in government by commissions.

In the main his statement of history is complete, well documented, and well summarized. He starts with the premise that the two commissions arose from the same political and social movements and that they were designed to have the same essential duties and functions. His historical statement shows clearly that they have come to differ greatly. The explanation, the author believer, lies in the difference in personnel of the two commissions. To be sure, his statement of this conclusion is somewhat guarded. "In a broad sense, perhaps, the differences in personnel explain the dissimilar history and judicial relations of the two commissions. It is apparently the lack of statesmanship in the Federal Trade Commission that explains some of the differences. The Interstate Commerce Commission has continually cooperated with Congress and has relied upon the national legislature for additional powers or corrective legislation as the need arose."

Other matters in the author's opinion contribute to the difference in results between the two commissions. The inadequacy of the opinions and findings of one set of commissioners, which probably is closely related to personnel, is of importance.

It is pointed out that the courts differ as to whether the language of one act is stronger than that of the other. The tentative conclusion seems to be that the delegation of power is much the same in the two cases. There is, however, a striking difference in the enforcement procedure which grows out of the statutory provisions. The orders of the Interstate Commerce Commission automatically become effective within a specified time, but the Federal Trade Commission must apply to the courts for enforcement of each order. This latter fact, coupled with the multiplicity of cases that come, or might come, before the Federal Trade Commission, make it a much more unwieldy mechanism of control than is the Interstate Commerce Commission.

It is significant to note in this connection that prior to 1906 the Interstate Commerce Commission was under the same burden in enforcing its orders, and its authority was then seriously curtailed by the courts.

It seems to the reviewer that Mr. McFarland has insufficiently emphasized the difference in nature of the problems dealt with by the two commissions as part of the cause of difference in attitude of the courts to them. The monopolistic nature of the transportation system, and the public desire to limit unnecessary duplication of plant on the one hand and cut-throat competition on the other, were rather thoroughly crystalized before the full development of the Interstate Commerce Commission and its present powers.

The Federal Trade Commission, on the other hand, was given the problem, undoubtedly wisely, of defining unfair methods of competition in a very great number of fields and with vast variety of industrial patterns and tradition. Moreover there was at the beginning, and is yet, no real crystalization of public sentiment with respect to the nature or degree of control that it was desirable for any government agency to exercise over private industry.

The hodge-podge of opinion is clearly exemplified in the proposals for and even in the accepted form of the various industrial codes that have recently been adopted for the control of individual industries. Under such circumstances, it was well nigh impossible for any group of men to proceed with the precision and assurance in Federal Trade Commission activities that was possible for the Interstate Commerce Commission. This basic difference in the problems and public temper with which the two commissions were confronted seems to the reviewer an additional reason for the different attitude of the court in the two cases.

It is interesting to contemplate these two books together. The evidence in them indicates that depart-

mental or bureaucratic control has gone much further in England than in the United States. The matter here is in a state of balance. The experience with the Interstate Commerce Commission suggests further development of that sort of government. The experience of the Federal Trade Commission, on the other hand, suggests that the temper of the people and particularly of the courts is not yet ready to delegate legislative and interpretative power to commissions. The activities of the present administration have, in the main, been instituted since Mr. McFarland wrote his book and it may quite be that a new chapter in American bureaucracy is now developing.

ROLAND S. VAILE
University of Minnesota

Lord Reading and His Cases. By Derek Walker-Smith. 1934. New York: The Macmillan Co. Pp. xii, 400.—There is no pleasanter vacation for an American lawyer than to escape from the dry heat of one of our summers to the comparatively cool dampness of London. If the Long Vacation has not begun and the Law Courts are in full swing he will find on The Strand and at the Old Bailey the best entertainment in town.

The wigs and gowns of judge, counsel and clerk; the modulated voices; the speed without haste; the absence of what the reporters call "gruelling cross-examination"; the unexpected tang of the occasional flash of humor—all these furnish a new and interesting tone and setting for an old, old story.

To those who have had this experience this book will bring back many enjoyable memories; for those who have not it is recommended as a vicarious substitute.

During his time at the Bar none typified better than Lord Reading the best qualities of the successful English barrister or carried a heavier or more lucrative practice. This is sometimes forgotten by those who think of him as a former Lord Chief Justice and a great political personage.

Lord Reading's success as a barrister is attributable to his inherent capacity. He did not follow the usual route to the Bar—through a great "public school" and Oxford. In his youth he was a cabin boy and in his early manhood a stockbroker. In one way this was an advantage, for his business experience uniquely qualified him for commercial causes and in them he first made his reputation.

This volume, however, is by no means a dry chronicle of such cases, for Lord Reading was counsel in many *causes célèbres*: the Liverpool Bank case, the Hartopp Divorce Case, the Whittaker Wright Case, the Gaiety Girl Divorce Case, *Lever* vs. *The Daily Mail* and those milestones of English law, *Allen* vs. *Flood* and the *Taff Vale Case*. Mr. Walker-Smith has reported all of these and more, accurately and entertainingly. Not the least interesting feature of books of this kind is the fact that, because of the smallness of the Bar and the concentration of business in London, almost always the same counsel and judges participate in the trials. One has the impression of watching an all-star stock company playing in repertoire on the same stage.

In this connection it may be remarked that one's pleasure in reading *Lord Reading and His Cases* will be greatly enhanced if one reads as a parallel *The Life of Lord Carson*, for in that biography Marjoribanks, from the point of view of Carson, compares as consistent rivals Lord Reading and Carson. Mr. Walker-Smith gives the other side of the picture.

Unlike Carson and his other great rival, Birkenhead, Lord Reading however never participated in a murder trial until as Attorney General he was pitted against Marshall-Hall in the prosecution of Seddon.

Had his tenure of office been in normal times Lord Reading would probably have made a great Lord Chief Justice. As it was he will be chiefly remembered because he presided at the trial of Roger Casement. It is unfortunate for his reputation as a judge that his great ability caused him to be drafted for the more important diplomatic duties of wartime.

As enjoyable as it is, it would be unfair to leave the impression that for the lawyer this book is merely light entertainment. As a matter of fact it furnishes a better basis for a comparison of the English courts with ours than would a dozen treatises.

WALTER P. ARMSTRONG
Memphis, Tennessee.

Force in Peace. By Albert E. Hindmarsh. 1933. Cambridge: Harvard University Press. Pp. xii, 249.—This slim little volume is one of the most pertinent discussions of the whole question of pacific settlement of international disputes which has appeared during the postwar period. Without pretensions to an exhaustive or entirely original treatment of the issue of the use of force to achieve a state's objective Dr. Hindmarsh has succeeded admirably in defining the problem and indicating the major lines of policy and practice.

He divides the subject into two broad fields: private and state use of force in time of peace; and coercion and the League of Nations. Under the first he treats of the historical examples, now eliminated from international intercourse, of private action to obtain redress when the state failed to support an individual's claim. The various methods of state coercion short of war, such as display of force, embargo, pacific blockade, landing forces, military occupation, and bombardment, are analyzed in the light of actual experience. He rightly points out that, as, for instance, in the Manchurian and Shanghai episodes, "although thousands of troops were engaged in battle for several weeks, both governments denied the existence of war in the legal sense." It was to meet such a situation that the framers of the Covenant of the League attempted to mobilize "coercion" under the authority of the League alone, through the application of Article 16.

Dr. Hindmarsh devotes the final section of his book to a review of results under that article. He concludes that any alternative to present reliance upon self-help by individual states must present an effective method first, of inducing and enforcing positive principles and procedures for modifying the *status quo* within the family of nations, and second, of establishing some definite and conclusive test of aggression. He believes the problem not insurmountable, formidable as it has proved in the incidents of the last fifteen years. He considers the only practicable test one which will include not merely war in the technical sense, but all use of force as a means of coercion of one state by another. The author's clear and incisive analysis of the problem of sanctions will prove a useful introduction to an issue as complex as it is significant for the future of international relations.

Judicial Aspects of Foreign Relations. By Louis L. Jaffe. 1933. Cambridge: Harvard University Press. Pp. viii, 278.—The appearance of this study of the relation of the courts and the executive with respect to the interpretation and application of international law, especially in the field of recognition and non-recognition, is significant of the changing concepts concerning the function and prerogatives of the courts in international, public and private law cases affected by the determination of the status of foreign states. The author has explored the historical evolution of doctrine and practice respecting recognition and pursued their application not only by English and American courts but by those of seven or eight continental countries and by several international courts and claims commissions. Not only is it the most comprehensive discussion of the question in English, but it marks a definite development of doctrine based on a reappraisal of the relative independence of the executive and judicial branches in determining the status of foreign governments before the courts.

After reviewing the practice of independent determination by courts of legal problems involved in such matters as prize, sovereign immunity, neutrality, and the interpretation of treaties, unrestrained by the action of the executive branch, the author points out the development of the doctrine and practice of recognition under the fiction of its being a "political question" the determination of which rests exclusively with the executive. It is not difficult—and Dr. Jaffe makes the most of his opportunity—to point not only the inconsistency of this position with relation to the areas of interpretation mentioned above but the contradictions which such a rule creates in the settlement of private as well as public claims. He suggests, after an exhaustive review of the authorities, whose views he subjects to a critical and not always deferential analysis, and of the opinions of the jurists, that "in the recognition cases the courts have developed a narrow and insular conception of their function. They have viewed it as definitely limited to the preservation of the national order, and have closed their eyes to the fact that the national order does not and cannot exist in a vacuum but is contingent upon and related to other national orders and the international order which is the sum of these orders. This conception is contrary to the general attitude traditionally taken by our courts, well exemplified in the prize decisions, that the function of a national court is *ipso facto* international." Dr. Jaffe wishes to see a reassumption of independent determination of the legal results of the acts of all states, recognized and unrecognized, by the courts; he has written a cogent argument with refreshing freedom from subservience to legal fiction or uncritical acceptance of authority. His style is lucid, straightforward, often entertaining, and serves to make a technical subject good reading —as well as good law.

Amherst College. PHILLIPS BRADLEY

Trade Associations and Industrial Control. By Simon N. Whitney. 1934. New York; Central Book Company. Pp. xi, 237.—This book covers much more than its title seems to indicate. It is a treatise on modern industrial organization with particular reference to the provisions of the National Industrial Recovery Act and to the problems this Act has partly made evident and partly created.

A large portion of the book is taken up with a discussion of the Trade Associations as they functioned before the National Industrial Recovery Act became law. Detailed statements are given concerning Trade Associations in the cotton goods, carpets, copper, rayon, refined sugar, woolen goods, industrial alcohol, and rubber products industries. The organization of these Trade Associations is discussed, as well as their methods and their achievements. The author makes it very plain (p. 38) that "the real core of the trade association movement has lain in its attack on free competition." The aim to be achieved thereby was, in the author's opinion, the stabilization of industry in which, he thinks, the associations were in most cases not successful. Some doubts may be justified as to whether "stabilization" was the ultimate aim of Trade Associations and as to whether they have not been somewhat more successful in their activities.

The last portion of the book is the most important one. Here the author treats in a relatively short space, but still with sufficient emphasis, the special problems the National Industrial Recovery Act has created with respect to industrial control. The difficulties which control of prices, control of production, and control of investment would have to face are well stated. While the author seems well aware of the disadvantages and evils of free competition, he has no faith in the feasibility of a "controlled" capitalism and in the efficiency of governmental control. He advocates the suspension of the National Industrial Recovery Act and the return to free competition. But he well knows that free competition is, in some industries, no longer workable, for which he urges public control.

The book is well written, instructive, and well worth reading.

Princeton University. OTTO NATHAN

Methods in Sociology. By Charles A. Ellwood. 1934. Durham, N. C.: Duke University Press. Pp. xxxiv, 214.—From the lawyer's point of view this book might well have used as its introductory chapter the author's Chapter X, entitled, "The Sociological Basis of Law and Government." Here we find a searching inquiry concerning the background which sociology provides for understanding and interpreting the law, and also a kindly and critical inquiry into the lawyer's attitude toward the law—its place and purpose in our social structure. Typical excerpts from the chapter will reveal the philosophy of the author:

"Now the bearing of all these simple sociological principles upon the law is evidently this: namely, that law is one of the chief means of social control of individual conduct."

"Instead of law lessening with social evolution, then, it is bound to increase in amount and also in relative importance to the life of the group. As each new condition in the social life arises, some means of social regulation and control has to be found and usually the most simple and direct means is through the law."

"We are still without a system of law that is adapted to our new and complex civilization. Because the legal profession has often failed to see the social character of law, they have sometimes made the mistake of considering law as something given for all time and hence instead of studying the new habits and con-

ditions of society, they have often attempted to apply rigidly old systems of law with disastrous consequences."

"Inasmuch as it is evident that laws need constant change to meet changed social conditions; as long as the bulk of this work of changing laws falls to the legal profession, it is the duty of the legal profession to equip itself for this function by an extensive knowledge not only of social conditions but of the principles which underlie social organization and social change."

Dr. Ellwood believes that social scientists have duties to perform as citizens as well as researchers, and in performing such duties should make the results of their scholarship available for the practical uses of communities, states and nations. In his opening chapter he expresses this point of view and emphasizes it in succeeding chapters, wherein he discusses scientific method, philosophical procedure, objective thinking, behaviorism, the theory of social progress and other typical subjects.

For lawyers who are unfamiliar with the general subject of sociology, or who having had occasional contact with this science in theory or practice may be interested in securing a better understanding thereof, this book will prove very revealing. It constitutes a guide book to the different schools of thought which exist within the ranks of the sociologists and an interpretation of sociology in its relation to law, economics, philosophy, government and education.

Duke University. JUSTIN MILLER

Civilization of the Old Northwest. By Beverley W. Bond, Jr., 1934. New York: The Macmillan Company. Pp. ix, 543.—Professor Bond of the University of Cincinnati for many years has contributed to our knowledge of early American history. He now presents a study of the Old Northwest in its political, social and economic standpoints from 1788 to 1812. Happily for the reader, it is both scholarly and vivid. He described the lure of the land and makes the reader feel the progress from the wilderness to statehood. His account is highly documented, quoting, as it does, from state papers, the early journals of the territory and private diaries. Because his account is so largely factual, these citations both encourage confidence and maintain the quality of the substance of the book. The white population increased from approximately 6,000 to 300,000 during the twenty-four years and, though mistakes were made, one cannot help being very proud of the material success, law and order, interest in education, the taste for books and all the ideals that were transplanted by the settlers from their former homes. The serious minds of our forbears did not prove cultural handicaps.

Chicago. MITCHELL D. FOLLANSBEE

Leading Articles in Current Legal Periodicals

Columbia Law Review, November (New York City)—Corporate Reorganization: Section 77B of the Bankruptcy Act, by Joseph L. Weiner; Developments in the Taxation of Reorganizations, by Homer Hendricks; The Trial of an Issue of Fact: I, by Jerome Michael, Mortimer J. Adler.

Illinois Law Rview, November (Chicago, Ill.)—Majority Rule in Collective Bargaining under Section 7 (a), by Minier Sargent; Extra-Legal Materials and the Law of Evidence, by John S. Strahorn, Jr.; The Torts of an Independent Contractor, by Clarence Morris; The Commerce Clause and the New Federal "Extradition" Statute, by John W. Brabner-Smith.

Journal of Air Law, October (Chicago, Ill.)—Proceedings of the Fourth Annual Meeting of the National Association of State Aviation Officials, Sept. 27-29, 1934; including, Recent Developments in Aeronautical Law, by George B. Logan; Regulatory Laws for Intrastate Aeronautics, by Denis Mulligan; A Uniform Program for Aeronautical Promotion and Control, by E. Smythe Gambrell.

California Law Review, November (Berkeley, Cal.)—The Securities Exchange Act of 1934, by John Hanna; Taxation of Capital Gains, Tax Avoidance and Other Problems under the Revenue Act of 1934, by Dana Latham; Recent Changes in the Bank and Corporation Franchise Tax Act (concluded) by Roger J. Traynor and Frank M. Keesling.

University of Pennsylvania Law Review, November (Philadelphia, Pa.)—The Clinical Lawyer-School: The Clinic, by Leon Thomas David; Does the Commerce Clause Give Power to Dominate All Industry? by Ira Jewell Williams; Administration of German Decedents' Estates, by Rene A. Wormser and Arthur Burchard.

New York University Law Quarterly Review, September (New York City)—A Fair and Equitable Plan of Corporate Reorganization Under Section 77B of the Bankruptcy Act, by John Gerdes; Obligation of Invalid Divorce on Person Who Induced It and Married Party Procuring It, by Augustin Derby; The New York City Charter Commission, by Charles W. Tooke; The Intention Test in the Law of Fixtures, by Russell Denison Niles.

American Journal of International Law, October (Washington, D. C.)—International Responsibility for Hostile Propaganda Against Foreign States, by Laurence Preuss; The Membership of the United States in the International Labor Organization, by Manley O. Hudson; New Light on Jay's Treaty, by Josiah T. Newcomb; The Regulation of Maritime Fisheries by Treaty, by A. P. Daggett.

Dickinson Law Review, October (Carlisle, Pa.)—The Political Thought of John Dickinson, by John Dickinson; Unscrambling Rights in Pennsylvania Building and Loan Associations, by Nochem S. Winnet; Crimes and Civil Injuries, by W. H. Hitchler.

Law and Contemporary Problems, October (Durham, N. C.)—Firearm Regulation, by John Brabner-Smith; The Problem of Fugitive Felons and Witnesses, by Harry S. Toy and Edmund E. Shepherd; Federal Anti-Theft Legislation, by Jerome Hall; The Lindbergh Law, by Horace L. Bomar, Jr.; A Note on the Racketeering, Bank Robbery, and "Kick-Back" Laws. Reorganization for Police Protection, by Donald C. Stone; The Interstate Compact—A Device for Crime Repression, by Gordon Dean; Federal Aid for State Law Enforcement, by Paul H. Sanders; Probation and Parole as Elements in Crime Prevention, by Sanford Bates; A Statistical Study of Federal Criminal Prosecutions, by Edward Rubin.

Harvard Law Review, November (Cambridge, Mass.)—The Public Influence of the Bar, Harlan F. Stone; Story's Commentaries on the Conflict of Laws—One Hundred Years After, by Ernest G. Lorenzen; Some Comments on the Corporate Reorganizations Act, by Henry J. Friendly.

Canadian Bar Review, October (Ottawa, Ont.)—Canadian-American Relations, by Norman MacKenzie; Problems Arising Out of Insurance Law, by Angus C. Heighington; Stephen Langton, by W. L. Scott.

Temple Law Quarterly, November (Philadelphia, Pa.)—The Federal Spending Power, by Vincent D. Nicholson; Comments Upon the Nature and Scope of Appellate Review Cases Originating in the United States Board of Tax Appeals, by William Cutler Thompson; Negligence in Golf, by George B. Clothier; Immunity from Compulsory Self-Incrimination in a Federal System of Government, by J. A. C. Grant.

Washington Law Review, October (Seattle, Wash.)—Funds Available for Corporate Dividends in Washington, by Joseph Warren Greenough and Leslie J. Ayer; Conditional Sales and Chattel Mortgages, by William F. Starr.

PROPOSED CODIFICATION OF OUR CHAOTIC NATIONALITY LAWS

Probably No Branch of the Law in This Country Is More Open to Criticism upon the Grounds of Instability, Inconsistency, and Ambiguity Than That Governing Citizenship—Not the Least Ambiguous of All the Statutes on the Subject Is One of the Most Recent, the Act of May 24, 1934—Ample Justification for Executive Order Appointing Committee to Codify Existing Statutes into One Comprehensive Nationality Law, Etc.*

By Richard W. Flournoy

Assistant to Legal Advisor, Department of State

"NATIONALITY" may be defined as the relationship of a person to the state to which he owes permanent allegiance; and the corresponding term, "national" is applicable to either a citizen or a subject. "Citizenship" is frequently used as a synonym for "nationality."

Nationality involves important legal rights, and reciprocal obligations to the state, under whose laws these rights are conferred. The laws governing nationality, or citizenship, are basic in character, and upon them depend various subsidiary rights. Thus in all of the States of the Union, citizenship is the first prerequisite for voting, and in some of the States the right to hold real property is denied, wholly or in part, to those who are not citizens. Nationality is also a necessary condition to the right to diplomatic protection, and it is for this reason that questions concerning nationality are of constant concern to the Department of State of the United States and the foreign offices of other states. It is because of the basic character and peculiar importance of nationality laws that they are usually found, wholly or to a considerable extent, embodied in the constitutions of states.

Stability, consistency and clearness should, no doubt, characterize all written laws, but it is especially important that these qualities should be found in the laws governing nationality. Strange to say, in the United States the opposite is true. Probably no branch of the law in this country is more open to criticism upon the grounds of instability, inconsistency and ambiguity than that governing nationality, or citizenship. It is true that some very important provisions concerning citizenship are found in the Constitution of the United States. Reference is made to the provision of Article I, Section 8, conferring upon the Congress power to "establish an uniform Rule of Naturalization", and the provision of Article XIV of the Amendments that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside". But the greater part of the written law governing nationality in the United States is composed of scattered statutes, some old, dating back to the first Congress, and some new, passed at the last session of the Seventy-third Congress. Some of these statutes, including the oldest, have for years been the subject of discussion and divergent decisions of courts; and their meaning is still uncertain. Not the least ambiguous of them all is one of the most recent, that is, the Act of May 24, 1934 (Public—No. 250-73d Congress).

Our legislation concerning the acquisition of nationality at birth in cases of children born abroad of American parents has had a most peculiar history. The First Congress, in an Act of March 26, 1790 (1 Stat. 103), adopted a simple and reasonably clear provision, declaring children born of American parents "beyond sea, or out of the limits of the United States" to be "natural born citizens". This provision was not limited to children previously born abroad, but was prospective, as well as retrospective. In an Act of January 29, 1795 (1 Stat. 566), the principal object of which seems to have been to increase the period of residence in the United States required for naturalization from two to five years, Congress repealed the Act of March 26, 1790, and changed slightly the language of the section relating to children born abroad of American parents. In an Act of April 14, 1802 (2 Stat. 153), Congress repealed the Act of 1795 and adopted a provision so worded that it was retrospective, applying only to children previously born. This may have been unintentional—merely the result of careless drafting. It was not until sixty years later that Congress, its attention having been called to the defect through an article by Horace Binney, published in The American Law Register, rectified the law (Act of February 10, 1855; 10 Stat. 604) (Van Dyne on Citizenship, p. 33). The latter provision was embodied in Section 1993 of the Revised Statutes. Strange to say, the old defective provision of the Act of 1802 was never repealed, and may still be found, in a dormant state, in Section 2172 of the Revised Statutes and Title 8, Section 6 of the United States Code.

Under the provision of the Act of February 10, 1855, just mentioned, citizenship was acquired only through the father. This discrimination was not pleasing to the women's organizations which in recent years have been striving (and with much success) to have all discriminations based on sex in the laws governing nationality eliminated, and as a result of their activities, Congress passed the Act of May 24, 1934. It is not the intention of the writer to question the chief objective of this Act, the removal of discriminations against women in the law of nationality. The principle of equality between the sexes in the law of nationality appears to have been definitely adopted by this Government. But it seems desirable to call attention to certain provisions of this Act which need clarification.

By Section I of the Act, Section 1993 of the Revised Statutes was amended to place fathers and

*The views contained herein are to be regarded as personal, not official.

mothers on an equal basis in the transmission of nationality at birth to children born abroad. The first sentence seems to say that American citizenship is acquired at birth by a child born abroad to an American father and an alien mother, and by a child born abroad to an American mother and an alien father, as well as by a child born abroad to parents both of whom are American citizens. The second sentence, however, appears on its face to place a limitation upon the first by declaring that, "in cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

The Chairman of the Committee on Immigration and Naturalization of the House of Representatives, in presenting the bill which became the Act in question,[1] said that the provision just mentioned meant that a child having one alien and one citizen parent would not become a citizen until he should have fulfilled the two conditions prescribed in the last sentence of Section 1, and Senator Copeland, who had charge of the bill in the Senate, made a similar statement.[2] But the Attorney General, in an opinion of July 21, 1934, holds that the first sentence prevails, so that citizenship is acquired at the moment of birth in all three classes of cases, although, in cases of children having one alien parent, it is subject to defeasance upon failure to comply with either of the two conditions stated in the last sentence.

Another provision in the Act of April 14, 1802, has had a peculiar history. I refer to the provision, now found in Section 2172 of the Revised Statutes, and Title 8, Section 7 of the United States Code, that foreign born children under twenty-one years of age whose parents obtain naturalization in the United States "shall, if dwelling in the United States, be considered as citizens thereof." Incidentally this does not mean what it appears to mean. The phrase, "if dwelling in the United States," relates to the time when naturalization is acquired and not the period during which citizenship is retained. It seems to have been the rule, rather than the exception, that nationality laws fail to state in plain, unmistakable terms what is intended. Questions were raised as to the meaning of the provision last mentioned, especially (1) whether it applies to a child who is physically dwelling in the United States but has not acquired a permanent residence therein, and (2) whether it applies to a child who begins to dwell in the United States after the naturalization of his parent or parents, as well as to one who is dwelling in the country at the time of such naturalization.

It was deemed desirable to make it clear by new legislation (1) that the law does require a permanent residence in the United States on the part of the child, but (2) that such residence might be acquired after the naturalization of the parent. By Section 5 of the Act of March 2, 1907 (34 Stat. 1228), Congress sought to clarify the law. But the law has not been clarified. The courts seem to agree that R. S. 2172 has remained in effect, notwithstanding the adoption of Section 5 of the Act of March 2, 1907. But just what classes of cases each covers and what is their relationship, are questions which have not yet been definitely settled. The Circuit Court of Appeals for the Third Circuit seems to have held in U. S. ex rel. Rienzo v. Rodgers, 185 Fed. 334, that Section 5 of the Act of March 2, 1907 was merely intended to clarify R. S. 2172 in some particulars and must be read with it, while the Circuit Court of Appeals for the Second Circuit held later in U. S. ex rel. Patton v. Tod, 297 F. 385, that the two statutes apply to different situations, R. S. 2172 to cases of children who are dwelling in the United States when their parents obtain naturalization, and Section 5 of the Act of 1907 to children who acquire a residence in the United States after the naturalization of their parents. The language of Section 5 seems to uphold the latter theory, but the history of its adoption seems to support the view, expressed by Mr. Van Dyne in his book on Naturalization, that the later act was intended merely to clarify the earlier act in certain respects, so that the two must be read together. In Kaplan v. Tod, (1925) 267 U. S. 228, the Supreme Court seems to have assumed that both statutes were in effect, but did not undertake to define the scope of each or their relationship. The court merely held that the person whose citizenship was in question, not having been legally admitted to the United States as a resident, could not have been naturalized under either statute.

Section 2 of the Act of May 24, 1934 amends Section 5 of the Act of March 2, 1907, to provide for the naturalization of a minor through the naturalization of "the father *or the mother.*" Section 5 provides expressly for the repeal of certain acts and parts of acts, but no mention is made of R. S. 2172. Thus the provision in R. S. 2172 concerning the naturalization of minors seems still to be in effect, although its precise meaning and sphere of operation are difficult to apprehend, even more so than when the decisions mentioned were rendered. Also the amendment applies expressly to a child born abroad to parents both of whom are *aliens*, making no mention of one born abroad to parents of whom one is a citizen and the other an alien. The executive authorities will find it necessary for administrative purposes to place a construction upon Section 2 of the Act of May 24, 1934, which seems to them to carry out the intent of Congress, but it remains to be seen how it will be construed by the courts.

It would seem that the only satisfactory way to clear up this situation will lie in the adoption of a single provision to govern the naturalization of minors through the naturalization of their parents, and the repeal of the two existing statutes on the subject.

It would take too long to cover in this paper all of the points in which the nationality laws need amendment, but there are two very important classes of cases which especially need attention. I refer to cases of naturalized citizens who resume a residence of a permanent character in their native lands and persons born in the United States of alien parents or born in foreign countries of American parents, who acquire dual nationality at birth and reside in the foreign states of which they are nationals.

In Section 2 of the Act of March 2, 1907 (34 Stat. 1228), Congress adopted a provision governing the status and right to protection of naturalized citizens residing abroad. It provides that "when any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen". It further provides, however, "that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States

1. Cong. Record, April 25, 1934, pp. 7495-7496.
2. Cong. Record, May 10, 1934, p. 8712.

under such rules and regulations as the Department of State may prescribe."

The meaning and effect of the presumption provided for in this statute was for some years in doubt. In Anderson v. Howe, 231 Fed. 546, decided in 1916 by the District Court of the United States for the Southern District of New York, it was held that the statutory presumption meant actual loss of citizenship, although in a well reasoned opinion rendered in 1910 Attorney General Wickersham had construed the presumption as merely providing a rule for withdrawal of diplomatic protection and as not causing a loss of citizenship itself (28 Op. Atty. 504). It seems fairly clear that an opposite opinion would have meant that the statute was unconstitutional, since it would have involved the delegation by Congress to the Department of State of the power to legislate, by prescribing rules and regulations governing the very important subject of loss of nationality. Mr. Wickersham's construction has been followed by the courts in more recent decisions, including Camardo v. Tillinghast, 29 F. (2d) 527, decided by the Circuit Court of Appeals for the First Circuit in 1928, in which other decisions are cited.

While it is true that the opinion and decisions last mentioned have definitely settled the meaning of this statute, it is also true that they serve to reveal its inadequacy and the need of new legislation. There are hundreds of naturalized citizens who, for one reason or another have returned to their native lands and have resided there for years. Many of them have wives and children who have never been in the United States, and the children born after the naturalization of their fathers are born citizens of the United States. It does not seem fair either to the United States or to the countries from which these naturalized citizens came, and to which they have returned, for residence of a permanent character, that they should be allowed to retain the status of citizens of the United States indefinitely. It is believed that the law should be amended to provide for the definite termination of their American nationality. Probably the most practicable measure would be found in a simple statutory rule under which nationality would terminate, *ipso facto*, as the result of residence for a prescribed period in the country of origin. Some exceptions might be included, to cover specified classes, such as persons sent abroad to represent the Government of the United States, or commercial or other interests of the United States, but the rule should be as clear and simple as possible. Under such a rule neither the Department of State nor any other branch of the Government would, by an executive act or decision, deprive any person of citizenship. The law would be automatic, and the function of executive officials would be limited to finding the facts and applying the statutory rule in cases presented to them for action of some sort.

It has been suggested that a statutory rule of the kind suggested would be unconstitutional, because it would make a distinction between naturalized citizens and native citizens with regard to loss of nationality. This contention is believed to have no validity. No doubt, under the Constitution, naturalized citizens are to enjoy in the United States rights equal to those enjoyed by native citizens, except with regard to eligibility to the Presidency, but it does not follow that loss of nationality in cases of naturalized citizens on the one hand and native citizens on the other must be governed by the same rules.

Naturalization is a privilege conferred by the Government upon aliens who comply with certain conditions, one of which is that they intend to reside in the United States and perform the duties of citizenship. The power conferred upon the Congress by the Constitution (Art. 1, Sec. 8) "to prescribe an uniform Rule of Naturalization," surely connotes the power to prescribe rules under which the status acquired through naturalization is forfeited by the act of the person naturalized. The provision of the Fourteenth Amendment that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States" was intended to settle questions concerning the citizenship of certain classes of persons in the United States. It does not lay down, either expressly or by implication, a rule concerning loss of nationality in cases of persons residing abroad. In particular, it does not say or imply that loss of nationality in cases of naturalized citizens who have returned to reside in the foreign states from which they came must be governed by precisely the same rules which govern loss of nationality in cases of native citizens of the United States who do not possess and have never possessed the nationality of a foreign state. The Constitution is to be regarded as a reasonable chart of government, which takes into account the multiform situations and conditions to which laws are to be applied. It may be observed that the treaty making power has assumed authority to prescribe rules in treaties whereunder resumption of residence of a permanent character by a naturalized citizen of the United States in his native land results in loss of his American nationality. (See in particular the multipartite Pan American Treaty, signed at Rio de Janeiro, August 13, 1906.) If the treaty making power has this authority, through implication, surely Congress has equal authority, to say the least, especially in view of the express provision in Article I of the Constitution concerning naturalization.[3]

While the Constitution does not require that the same rules should govern loss of nationality in cases of native and naturalized citizens, it is believed that, as to certain classes of native citizens there should be a statutory rule under which citizenship would be forfeited through the fact of foreign residence. Reference is made to persons born with the nationality of another state as well as that of the United States, including persons born to American parents in certain foreign states having *jus soli* in their law and persons born in the United States to parents who are nationals of certain foreign states having *jus sanguinis*. If such persons after attainment of majority choose to reside in the foreign states whose nationality they have, it would seem not only reasonable but very desirable that, under conditions to be prescribed by statute, their American nationality should be made to terminate automatically, so that thereafter they would not be in a position to harass the Government by appeals for diplomatic protection and reclamations against the governments of the foreign states of which they are also nationals and in which they live.

There was surely ample justification for the Order of the President of April 25, 1933 designating the Secretary of State, the Secretary of Labor and the Attor-

3. In Mackenzie v. Hare, 1915, 239 U. S. 299, plaintiff contended that Congress had no power, under the Constitution, to prescribe a rule under which an American woman would expatriate herself by the mere fact of marrying an alien, that is, she denied the validity of Section 3 of the Act of March 2, 1907. The Supreme Court, however, upheld the Statute as constitutional, Mr. Justice Sutherland, rendering the opinion, said:

"Plaintiff contends, as we have seen, that it has not, and bases her contention upon the absence of an express gift of power. But there may be powers implied, necessary or incidental to the expressed powers. As a government the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers." (p. 311)

ney General a Committee to "review the nationality laws of the United States, to recommend revisions, particularly with reference to the removal of certain existing discriminations, and to codify those laws into one comprehensive nationality law for submission to the Congress at the next session." Under this Order an Advisory Committee composed of officials of the three Departments was organized. Much preliminary work has been done by this Committee and some substantive proposals have been formulated. It is expected that the recommendations of the principal Committee will be completed in time for the submission of the final report to Congress when it meets. It was hoped and expected that the report would have been completed before the adjournment of the last Congress, but as the field covered by a comprehensive report is very wide and involves many extremely difficult problems, and as the changes proposed are quite extensive, involving questions of international law and policy, as well as questions of domestic law and policy, the preparation of the report has taken more time than was expected.

It may be observed that this is not the first time that the Executive has initiated an extensive review of the nationality laws, with a view to their clarification and possible amendment. On August 6, 1873, President Grant addressed letters to the members of his Cabinet asking for their views upon seven questions relating to citizenship and protection abroad. Their replies, which are printed in Part 2 of the Foreign Relations of the United States for 1873, are interesting and illuminating, especially that of Mr. Richardson, the Secretary of the Treasury, which includes a review of the decisions of the courts relating to the question of the right of expatriation. In the same volume are printed other documents concerning citizenship and diplomatic protection, including the report of the distinguished British Commission of 1868, appointed by the Queen, "for enquiring into the laws of naturalization and allegiance" etc. This volume also contains the nationality laws of various states, diplomatic correspondence between the United States and Great Britain and other states, and Attorney General Cushing's noted opinion of October 31, 1856 concerning expatriation, the whole covering 266 pages. This review undoubtedly served to clarify the then existing law and practice, but it did not result in codification.

On April 13, 1906 the Senate passed a Joint Resolution providing for a commission to examine into the subjects of citizenship of the United States, expatriation, and protection abroad and to make a report and recommendations thereon, to be transmitted to Congress for its consideration. The Resolution carried an appropriation of $10,000 for the expenses of the Commission (S. Res. No. 50, 59th Cong. 1st sess.). However, the House Committee on Foreign Affairs did not consider the creation of such a Commission necessary for carrying out this work, and, in a report of June 6, 1900, recommended that the Secretary of State "select some of the gentlemen connected with the State Department who have given special attention to these subjects, have them prepare a report and propose legislation that could be considered by Congress at the next session." Accordingly the Secretary of State directed Mr. James Brown Scott, Solicitor for the Department of State, Mr. David Jayne Hill, Minister of the United States to the Netherlands, and Mr. Gaillard Hunt, Chief of the Passport Bureau, to make the inquiry and prepare a report for consideration by the Senate and House Committees. Their report, which is printed in a volume of 538 pages (House Doc. No. 326, 59th Cong. 2d Sess.), contained certain recommendations, which were instrumental in bringing about the passage of the Expatriation Act of March 2, 1907 (34 Stat. 1228). The appendix, including a collection of nationality laws of foreign states and a discussion of the decisions of courts in the United States, has been, and still is, in constant use as a reference book.

The statute just mentioned has been very useful in some respects, but it is now largely out of date. The provision of Section 2 concerning the presumption of expatriation in cases of naturalized citizens residing abroad has been discussed above. Sections 3 and 4, concerning the acquisition and loss of citizenship by women through marriage, were repealed by the Cable Act of September 22, 1922. Section 5, relating to the naturalization of minors, has also been discussed. Section 6, requiring children born abroad of American parents to make a declaration upon reaching the age of eighteen and to take the oath of allegiance upon attaining their majority, "in order to receive the protection of this Government," was not sufficiently far reaching, definite or decisive to be of much practical value. This provision should have included persons born in the United States of alien parents and taken during childhood to their parents' countries to reside. Also, it is believed that it should have provided for loss of nationality itself and not for mere loss of the right to protection.

In this brief survey it has been impossible to discuss all of the phases of the law of nationality in which there appear to be deficiencies or ambiguities. However, mention may be made of the fact that we have no statutory provisions defining the nationality status of persons born in the Canal Zone, Guam or Samoa. It may also be noted that, while a person born in the Virgin Islands of parents having the nationality of a foreign state, is born a citizen of the United States (Sec. 3, Act of February 25, 1927, 44 Stat. 1234), this does not seem to be true of a person born in Puerto Rico of such parents. (Act of June 27, 1934, Public—No. 477—73d Congress.)

It is to be hoped that, when a code of nationality is adopted, it will be comprehensive, repealing all pre-existing statutes on the subject, and re-enacting only those provisions which require no change in substance or phraseology. Also it is to be hoped that those who are responsible for the final product will profit by past experience, and, bearing in mind the endless administrative difficulties and expensive litigation which have resulted from the defects in nationality laws heretofore enacted, will see to it that the code is not only adequate in substance to meet existing conditions but logically arranged, consistent, definite and clear in form. Care and accuracy in drafting are nowhere more needed than in laws relating to nationality, since it is of the greatest importance that those who are called upon to administer these laws should be able to say with some degree of confidence what they mean, and that those whose status and vital interests are affected should know where they stand.

It is believed that the support of the American Bar Association, which in recent years has shown a special interest in law making, and particularly in legislative drafting, would be of much assistance in bringing to a successful conclusion the movement already begun to revise and codify the nationality laws of the United States.

TITLE HAZARDS ARISING FROM REVENUE LAWS

Unless Lien Statutes Are Drawn to Provide for Notice in Places Where One Normally Searches for Encumbrances on Real Property, Innocent Purchasers or Encumbrancers Are Apt to Suffer—Illustration of Liens Almost Impossible to Discover—Federal Liens with Which Examiner of Titles Is Chiefly Concerned—History of R. S. 3186 Shows How Law Can Be Rationalized*

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THERE is a very widespread feeling that real property is called upon to bear too large a proportion of the total taxes necessary to the support of our various governmental authorities. There is an equally widespread feeling among those whose business it is to examine the title to real estate that the indiscriminate burdening of real estate with liens for all sorts of taxes is being badly overdone. As between the government and the owner, there is no particular objection to making any sort of obligation to the government a lien. But unless lien statutes are so drawn as to provide for notice in the places where one normally searches for encumbrances on real property (a consummation devoutly to be wished but too rarely attained), it is the innocent purchaser or encumbrancer who is apt to suffer.

Too often liens are created that are almost impossible to discover. To illustrate:

A few years ago the legislature of the state of Ohio almost passed a law providing that the unpaid taxes of a gasoline dealer should be a lien on all his real estate. There was no provision for the filing of the lien in any public office. Had this law passed it would have been necessary for any one examining any title to find out whether or not the owner was a gasoline station proprietor, and whether or not he had paid his gasoline taxes. When the attention of the legislature was called to the ridiculousness of this statute and the impossible burden it would put upon innocent purchasers, the lien provision was cut out. But it might have passed and would have passed had not the title men of Ohio called attention to its unfairness. I trust that the lawyers will not object to this sort of activity on the part of title men.

Another illustration of the creation of a lien without providing for some form of recording thereof is furnished by Ohio's "3 point 2" Beer Law, which is still in effect, notwithstanding the fact that no one drinks that sort of beer except on Sunday when it is unlawful to sell the more powerful product. Section 49 of the Act provides for a tax on the manufacturer and distributor of beer by the barrel. Section 53 provides that this tax "shall be a lien upon all the property of the taxpayer or permit holder." This law is subject to the same criticism as the proposed gasoline tax discussed above. It is just another instance of creating a lien without providing a reasonable protection for the innocent purchaser.

Most of the states have a franchise tax on corporations, which tax is a lien on all the property of the corporation. The history of Ohio's corporation franchise tax shows what can be done to rationalize a revenue lien. Section 5506 of the Ohio General Code provides that on a certain date the tax and penalties "shall become a lien on all property in this state" of the corporation. Prior to 1929 this statute created a "first and best lien," but there was no provision for filing the lien in any public office, and it was necessary to get the required information by writing to the Secretary of State. By an amendment to G. C. 5506 passed in 1929 it is provided that corporation franchise taxes shall not be a lien as against innocent purchasers and encumbrancers until a notice thereof is filed in the office of the county recorder. That is the title man's idea of a sensible lien law.

It came to me as a shock some years ago to learn that in some states personal property taxes were a general lien on the personal tax-payers' real estate. At that time I congratulated myself that Ohio had not taken this step. But in 1931 Ohio followed a bad example and enacted a law making personal taxes a lien on real estate. However, Ohio's law is not so bad as some, for it provides that the personal tax shall not be a lien until a notice thereof is filed by the taxing authorities with the county recorder, and it further provides that no personal taxes in an amount less than $100.00 shall be recorded.

The objection to making personal taxes a lien on real estate is that it throws an unreasonable burden upon the intending purchaser or mortgagee. It throws upon the purchaser or mortgagee the burden of determining whether or not the John Smith from whom he is purchasing, or upon whose property he is about to make a mortgage, is one of the hundred John Smiths against whom there are personal taxes charged. Of course the same objection may be raised as to the general lien of judgments, but I am consistent in this, as I have always contended that making judgments a general lien on real estate is an abomination. The sensible judgment lien law is that of Michigan, where a judgment is not a lien without a levy on specific land. Such a law very properly puts upon the judgment creditor the burden of finding out what real estate the judgment debtor owns. A law which makes judgments a general lien on all the

*Address read at the meeting of the Section of Real Property of the American Bar Association, held at Milwaukee on August 28.

real estate of the judgment debtor puts upon the purchaser or mortgagee the burden of determining at his peril which (if any) of the John Smiths, against whom judgments have been taken, is the owner of the land the title to which is being searched.

Just about now I shall probably be accused of wandering away from my subject, which at the beginning was announced as being about Federal Liens, and so far I have said nothing about Federal Liens. My excuse is that I received permission from the deviser of this program to discuss state tax lien laws, as I felt that some of the state laws illustrate better than federal laws what I consider defects in revenue lien legislation. And had I devoted myself to Federal Liens alone there would not have been meat enough in my subject for a full length paper.

The liens with which the Examiner of Titles is concerned are internal revenue liens, chiefly income taxes, estates taxes, and gift taxes. The lien of internal revenue taxes (other than the estates and gift tax) is governed by Title 26, Section 115, United States Code Annotated (formerly R. S. 3186).

The history of R. S. 3186 (now 26 U. S. C. A. 115) is a very good illustration of the rationalizing of a law which, as it formerly existed, placed an impossible burden upon any one who attempted to examine a title for an intending purchaser or mortgagee.

Prior to 1913, R. S. 3186 (26 U. S. C. A. 115) read substantially as follows:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States, from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person."

In 1913 there was added to the law the two following provisos:

"Provided, however, that such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the clerk of the district court of the district within which the property, subject to such lien, is situated

"Provided further, Whenever any state by appropriate legislation authorizes the filing of such notice in the office of the registrar or recorder of deeds of the counties of that state, or in the State of Louisiana in the parishes thereof, then such lien shall not be valid in that state as against any mortgagee, purchaser, or judgment creditor until such notice shall be filed in the office of the registrar or recorder of deeds of the county or counties, or parish or parishes in the State of Louisiana, within which the property subject to the lien is situated."

The question naturally arising as to the lien created by 26 U. S. C. A. 115 (R. S. 3186) are: 1. When does the lien attach? 2. To what property does it attach? 3. What is its relative priority? 4. How long does it continue as a lien? 5. By what legal proceedings may it be removed?

When does the lien attach? Prior to 1913 as to all persons, both lienee and third parties, the lien attached at the time the assessment list was received by the collector. This is still the law as to the lienee, but as to purchasers, mortgagees, or judgment creditors the lien attaches since 1913, either (a) upon filing notice of lien with clerk of the district court, in those states which have not provided for filing the same in the office in which deeds are recorded, or (b) upon filing of notice in the office of the recorder of deeds, in those states which have taken advantage of the permission granted by the 1913 amendment.

Whether there be any states which have not taken advantage of the permission granted by the 1913 amendment, I know not. If there be any such states they would seem to be inexcusably negligent, the more so since the Commissioners on Uniform Laws in 1926 adopted a model law known as "The Federal Tax Lien Registration Act."

It is well to remember, in those states where no provision is made for filling revenue liens in the recorder's office, that no provision is made by the statute for indexing the liens by the district court clerk. In Cleveland it was always the custom to index the liens in the civil court index and we presume this custom is general. But in this matter the title man must govern himself in his search by the local custom.

It is also well to remember that the filing of the lien in the office of the district court clerk and in the county recorder's office in those states which have provided for filing the same, is only for the protection of the purchaser, mortgagee, or judgment creditor. As to the tax delinquent himself and as to all persons not coming within the three classes mentioned, the tax is a lien as soon as the assessment list is received by the collector.

To what property does it attach? The best answer to this question is found in *U. S. vs. Pacific R. R. Co.*, 1 Fed. 97 (1880) in which the court says that "the lien created by the R. S. 3186 relates back upon demand, to the time when the tax was due, but only attaches to the property belonging to the person from whom the tax was due at the time when the demand for payment was made."

No cases have been found discussing the question as to whether or not the lien attaches to after acquired property. We must, therefore, be guided in this matter by the general law as to liens, which according to 17 C. J. 324 is that "in the absence of provision showing an intention to extend the lien to after-acquired property, a lien attaches only to property on hand at the time it is created." (Citing *Borden vs. Croak*, 22 N. E. (Ill.) 793 and *Thornsberry vs. Thornsberry*, 68 S. W. (Ky.) 129).

What is the relative priority of the lien? It is sometimes argued that, since the revenue tax is a debt due the government, the lien of the tax is paramount and will over-ride prior liens. Without going into the cases on this subject I shall have to ask you to take my word for it that the lien is not a paramount lien, but that it has the same priority or lack of priority that any other lien has.

How long does the lien continue? R. S. 3186 says the taxes shall be a lien until paid. While it is true that the recent revenue acts have placed certain limitations on the time for assessment of the tax, and upon the time in which suit must be brought to collect the same, it is probable that these limitations have nothing to do with the lien provided by R. S. 3186. The general law on this subject, as laid down in 17 C. J. 700, is as follows:

"The rule sustained by the weight of authority . . . is that where the security for a debt is a lien on the property, personal or real, the lien is not impaired because the remedy at law for the recovery of the debt is barred."

By what legal proceedings may the lien be removed? Prior to 1924 there was absolutely no way

to remove the lien by legal proceedings since there was no method by which the United States could be brought into foreclosure proceedings. In 1924 R. S. 3207 (now 26 U. S. C. A. 136) was so amended as to provide a method of adjudicating federal liens in district courts of the United States. But the law was hedged about with so many restrictions as to be practically unworkable.

In 1931 a law was enacted (Title 28, Sections 901 to 906, United States Code Annotated) which permits the bringing of the United States into foreclosure proceedings in state courts. Section 902 of the act provides that service may be had on the United States by serving the district attorney and mailing a copy of the petition and process to the Attorney General. Section 903 provides that the suit may be removed to the United States district court. Section 904 provides that, if the lien of the United States be a prior lien, the sale must be made subject thereto unless the United States consents to a sale free of all liens. This section also provides that where a sale is made to satisfy a lien prior to that of the United States, the United States shall have one year from date of sale within which to redeem. Section 905 provides a method whereby a junior lien of the United States may be released by the Comptroller General upon a showing that the lien is without value.

This act has removed about all the objections that Examiners of Title had raised concerning the creation and enforcement of internal revenue liens. My only criticism of this act is the year's right of redemption given to the United States. This is certainly an anomaly in a state like Ohio wherein there is no right of redemption after foreclosure. This right of redemption will rarely, if ever, be exercised by the United States, but the existence of the right has the effect of clouding the title for the period of one year after the sale in foreclosure.

The lien of an internal revenue tax may of course be removed by payment.

In case of payment of the tax the Collector of Internal Revenue issues a certificate of discharge (Form 669) which reads as follows:

"I hereby certify that the taxes enumerated below, heretofore assessed against the following named person, firm or company, have been paid in full, together with all penalties, costs, and interests; and that the lien for such taxes, penalties, etc., created by Section 3186 of the Revised Statutes of the United States, as amended by Act March 4th, 1913 (37 Stat. 1016), has thereby been discharged in full."

This certificate is filed with the district court clerk in those states having no statute permitting the recording of revenue liens, and with the county recorder, or other recording officer, in those states having a law permitting the recording of revenue liens.

The only other federal tax liens that are of importance to the Examiner of Titles are the estates tax and the gift tax.

There has been a Federal Estates Tax since September 8, 1916. The law has been amended a half dozen times and for its provisions it is always necessary to consult the latest revenue law. The provision that chiefly affects the title man is the lien of the tax, which has been the same in all laws. It has always been provided that "unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent."

As was said in *Page vs. Skinner,* 298 Fed. 731 (1924) "the imposition took effect at the time of death, and the tax became at once a lien on the property of the estate, enforceable by sale if not paid, on proceedings in court."

The estates tax is not subject to the provisions of R. S. 3186 (26 U. S. C. A. 115) and becomes a lien immediately on the death of the decedent and there is no provision for filing notice of the lien.

The statute provides for the execution by the commissioner of internal revenue of releases of the lien, but there is no provision made for the recording of said releases. In the matter of the Estates Tax the title man must govern himself in accordance with the information as to the estate derived from the administration proceedings on the decedent's estate.

We have had in the past and now have a gift tax which is somewhat puzzling. Title 26, Section 1136 j, United States Code Annotated, provides that the gift tax shall be a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made. The act then provides: "If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. Any part of the property comprised in the gift, sold by the donee to a bona fide purchaser for an adequate and full consideration in money or money's worth, shall be divested of the lien herein imposed and the lien, to the extent of the value of such gift, shall attach to all the property of the donee (including after acquired property) except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth." The act further provides for a release by the Commissioner upon being satisfied that the tax liability has been fully discharged.

There has been an attempt in this act to protect the innocent purchaser and possibly he is protected. It is certainly impossible, except by an examination outside the records, to determine whether a deed is, or is not, a deed of gift, since practically all such deeds are made for a nominal valuable consideration. It might be possible by inquiries outside the record, to detect the gift in the hands of the first donee, but the lien created on other lands of the donee after a sale of the gift, is pretty much of a blind lien. The only real remedy that I can suggest is to bring the gift tax specifically within the provisions of 26 U. S. C. A. 115 (former R. S. 3186), the act which permits the recording of federal liens. For I am inclined to think that neither the estates tax, nor the gift tax, comes within the purview of this act. In the matter of the estates tax this is not a serious defect, since the existence of the lien of the estates tax may be discovered from the administration proceedings on the decedent's estate. But there will rarely be anything of record from which the lien of the gift tax may be discovered.

In addition to calling attention to the law of revenue liens this paper was supposed to suggest remedies for any defects which seem to be in such legislation. If you have followed the discussion thus far you will see that my suggested remedies would be as follows:

(1) Legislators ought to get over their bad habit of making every sort of a revenue tax a lien

on real property. The lien is usually a junior lien and nothing is realized thereon by reason of the fact that the tax is made a lien.

(2) If such taxes are made a lien it ought to be provided that the lien is not effective as against purchasers and encumbrancers until notice thereof is filed in the office where deeds and mortgages are recorded.

(3) Provision should always be made for the bringing of some public authority into foreclosure actions, so that the lien may be adjudicated as against other liens. In the case of many state liens, it is difficult to determine who is the proper public official to bring into foreclosure proceedings, and what, if any, method there is, by means of which the priority of the state's lien may be adjudicated.

RECEIVERS AND LIQUIDATORS IN ENGLAND

Nature of Their Appointments and Duties Compared and Contrasted—Receivers Only Appointed in Respect to Property Comprised in and Charged by a Mortgage or Debenture—The Official Receivers Are Civil Servants Paid Fixed Salaries by the Government—Fees Received by Them Constitute Part of National Revenue—System Has Confidence of Public

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IN England, except for special purposes in a limited number of cases, a Receiver is only appointed for the purpose of enforcing a security given either by an individual or by a company. No Receiver can be appointed except in respect of property comprised in and charged by a mortgage or debenture.

A Receiver can be appointed when the mortgagor is in default in payment of interest or repayment of capital or any instalment thereof, but as soon as default has been made by the mortgagor in either respect or there has been any breach, nonperformance or nonobservance of any other provision, condition or stipulation contained in the mortgage or debenture, on the happening of which the instrument provides that the mortgagee shall be entitled so to do, the mortgagee can appoint a Receiver by a memorandum under his hand without obtaining any leave of the Court or any order from the Court and without the institution of legal proceedings of any kind.

The Receiver takes possession of the property and manages it until he can sell it. In the meanwhile he collects the income, discharges the current outgoings thereout and pays the balance (after deduction of his remuneration which is usually five per cent of his receipts) to the mortgagee, first in discharge of accrued interest and then in reduction of the principal sum.

When the mortgaged property is sold the principal, interest, legal costs and remuneration of the Receiver are discharged thereout and the Receiver pays over any balance to the mortgagor.

During the receivership the Receiver is the agent of the mortgagor (who is alone responsible for the acts and defaults of the Receiver and for his remuneration) and not of the mortgagee although, from all practical points of view, he behaves as if he were the agent of the mortgagee, observes the mortgagee's instructions and accounts primarily to the mortgagee.

A Liquidator is appointed under quite different circumstances although his functions are somewhat similar.

There can be no Liquidator appointed except to deal with the affairs of a private or public registered limited company which has gone into liquidation.

In this country there are three forms of liquidation, viz: 1. Members' voluntary liquidation. 2. Creditors' voluntary liquidation. 3. Compulsory liquidation.

A members' voluntary liquidation takes place when the shareholders of the company decide by resolution to bring the company to an end. To permit the winding up to be a members' voluntary liquidation it is necessary for a majority of the directors of the company to make a Statutory Declaration on oath to the effect that the company has sufficient available assets to pay all its creditors in full within a period not exceeding twelve months from the date of the commencement of the winding up. Having made this Declaration and filed it with the Registrar of Companies, the shareholders in general meeting can appoint their own liquidator who then takes possession of the whole of the assets of the Company, pays the debts and distributes the surplus among the shareholders.

A creditors' voluntary liquidation usually implies that there are not sufficient assets to pay the creditors in full. The shareholders of the company pass a resolution that it is desirable for the company to go into voluntary liquidation, and they appoint a liquidator of their own nomination. The company is then obliged to hold a meeting of its creditors on the same day, or the following day, when the creditors are entitled to appoint a liquidator of their nomination either to act with the liquidator appointed by the shareholders, or in

place of him. If there is any difference between the shareholders and the creditors a summary application is made to the Court, and the Court almost invariably appoints the creditors' nominee as the liquidator of the company and displaces the nominee of the shareholders.

A Liquidator appointed in such a liquidation carries on in the same way precisely as a liquidator appointed in a members' voluntary liquidation, but it is seldom that there is any surplus to divide among the shareholders. Occasionally there is such a surplus, but it is very rare.

The third form of liquidation is a compulsory liquidation by or under the supervision of the Court.

Official Receivers have no concern whatever with voluntary liquidations of either type and are concerned only with compulsory liquidations.

Compulsory liquidations under the supervision of the Court are very rare and do not justify any real consideration.

In a supervision case the voluntary winding up is continued subject to the supervision of the Court, and it is a kind of unsatisfactory mixture of both procedures.

In recent years very few supervision orders have been made and it is probable that they will soon be a thing of the past.

The ordinary procedure is the compulsory winding up. It results from an order made by the Judge of the Companies Court on the petition usually of a creditor but occasionally of a shareholder. In most cases the petition is based on the insolvency of the company and the failure of the petitioning creditor to collect a debt which is due to him.

A shareholder's petition is usually based upon a deadlock in the company's affairs or some gross irregularity in the conduct of the affairs of the company or failure to comply with statutory regulations.

On the hearing of the petition (whether presented by a creditor or a shareholder) the Judge either dismisses the petition or makes what is described here as "the usual compulsory order." This is an order that the Company be wound up compulsorily by the Court, and that "one of the Official Receivers attached to the Court be constituted Provisional Liquidator of the affairs of the Company."

The department of the Official Receivers in Companies Liquidation (to give it its full title) is a department of the Board of Trade. It consists of three Official Receivers, various assistant Official Receivers and a large number of examiners and minor officials acting under them.

The Official Receivers and their subordinates are civil servants paid fixed salaries by the Government entirely regardless of the amount of work done or the fees collected by them in connection with the liquidations with which they deal.

Fees upon certain fixed scales are payable out of the assets of companies which they wind up but these fees are received by them on behalf of the Board of Trade and constitute a part of the national revenue of the Government.

Upon the making of a winding up order the Board of Trade nominates one or other of the Official Receivers to be the Official Receiver and Provisional Liquidator of the company. The Official Receiver then takes possession of the assets and acts for the time being as Liquidator.

After a preliminary investigation of the affairs of the Company, he calls separate meetings of the creditors and shareholders to decide whether the Official Receiver shall continue as Liquidator or whether some other person (usually a practising chartered or incorporated accountant) shall act as Liquidator in his place.

If a majority in number and value of the creditors vote in favor of an outside Liquidator and a majority in number and value of the shareholders vote in favor of the appointment of the same person as Liquidator, the Court appoints that person as Liquidator as a matter of course.

This outside Liquidator then displaces the Official Receiver and proceeds to wind up the company in a similar way to a voluntary Liquidator. In one respect, however, the Official Receiver is not displaced. As Official Receiver whether he is displaced by an outside Liquidator or not, he has a duty to investigate the affairs of every company which is wound up by the Court to see whether any fraud has been committed by anyone connected with the company in relation to the conduct of its affairs. If he comes to the conclusion that there has been any fraud, he reports to the Director of Public Prosecutions, who, if satisfied that any person or persons ought to be prosecuted, institutes the appropriate criminal proceedings and carries them through to trial.

An outside Liquidator in a compulsory liquidation has all the other powers of an Official Receiver, and these powers are wider and stronger than the powers of a voluntary Liquidator.

At the meetings of creditors and shareholders referred to above it is possible to appoint a Committee of Inspection consisting of a number of creditors and/or shareholders to assist the Liquidator in the winding up. Committees of Inspection are appointed very frequently.

If at the meetings the creditors want one outside Liquidator and the shareholders want another, or the creditors want the Official Receiver to continue as Liquidator and the shareholders want an outside Liquidator, or there is any other difference between the creditors and shareholders as to who should be the Liquidator or who should constitute the Committee of Inspection, the Companies Court on a summary application decides the matter without any right of appeal.

As a matter of practice the Court usually appoints the Official Receiver in disputed cases as the Court knows that he is absolutely impartial and is a stronger administrator than an outside Liquidator.

In practice, outside Liquidators are usually appointed in the case of companies which have assets and in the conduct of whose affairs there have been no irregularities or fraud.

The Official Receiver, on the other hand, is usually left with the liquidations of all the companies which have no assets, or very small assets, and he is also left or the Court insists upon appointing him in cases where there have been irregularities and where it appears that there has been fraud.

During recent years the public has got such confidence in the Official Receivers department that

the tendency now is for the Official Receiver to be retained as Liquidator even in the case of companies with substantial assets in which no irregularity or fraud is alleged.

The Board of Trade fees are usually very much smaller than those paid to an outside Liquidator, and this weighs a good deal with the general commercial public. The public also knows that an Official Receiver is absolutely impartial and subject to no outside influence. He discharges his duties without fear or favor and is indebted to no one for securing or assisting to secure his appointment.

The affairs of persons or firms who are made bankrupt (the equivalent of liquidation in a company) are administered on parallel lines by an entirely different branch of the Board of Trade, viz., the Official Receivers in Bankruptcy.

The composition and administration of that department is very similar to that of the Official Receivers department in Companies but the two departments occupy different buildings and have no connection with one another.

Where the same Official Receiver happens to be the Liquidator of two companies having conflicting interests he usually hands over one of the liquidatorships to one of his colleagues (with the consent of the Board of Trade). This, however, is not absolutely essential.

If he retains both liquidatorships he instructs separate solicitors to advise him, and they in turn instruct separate Counsel to argue questions of dispute before the Courts.

The Official Receiver acts upon the advice which he receives in each company and if it is conflicting he takes the opinion of the Court which is given after the point at issue has been argued by independent Counsel instructed independently. In practice no difficulty arises.

The whole system works admirably, is comparatively inexpensive, and has the complete confidence of the public.

STATUTORY CLASSIFICATION

Problem Is Entirely Distinct from the Frequently Attempted Philosophical Classification of the Law—The Two Competing Systems Are the Alphabetical Topic Method and a More or Less Logical Compilation or Code—Suggested Principle of Classification by the Application of Which the Defects of Both Methods Will Be Largely Avoided and Their Advantages Retained

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STATUTORY classification, is of course, a serious problem wherever and whenever a compilation or revision of the legislation of a jurisdiction is undertaken, as there must a scheme of some kind for the organization of the material. This is quickly seen by those concerned to be an entirely distinct problem from the frequently attempted philosophical classification of the law.

The problem has been variously solved by the jurisdictions which now have a general compilation or revision, but basically the arrangements are of only two types. Some, such as New York State, have employed the alphabetical topic method, while others, such as Wisconsin, have organized their general law in a single more or less logical compilation or "code." These are the competing systems.

Students of legislation appear to be agreed in condemning the alphabetical topic arrangement. This arrangement can make no pretense to rational organization, being dependent on the arbitrary sequence of the alphabet, and the almost fortuitous choice of designations of the topics or titles composing the group. However, it seems to offer certainty in sequences, with resulting ease of reference, and also offers freedom in selection of titles, and consequently of their scope and character. These considerations, and the fact that a series of topics are relatively easier to agree upon and to adopt than a single logical classification, probably explains the popularity of the alphabetical topic arrangement in practice.

Once adopted, however, the typical alphabetical topic scheme soon discloses its defects. The apparent certainty of sequences is discovered to be only in the mind of the compiler. The expected ease of reference disappears in the realization that it is necessary to refer from part to part of the compilation to find related materials. Finally, the freedom of selection of titles is seen to make for the bestowal of exaggerated importance upon minor topics, and the splitting of major topics into widely separated units. Those who ponder the matter appreciate that this separation of related materials and splitting of major topics not only works to the disadvantage of many users, but increases the possibility of conflicts and implied repeals, and decreases the opportunity materially to consolidate and to avoid repetition of uniform provisions, as of notice or procedure. Moreover, it soon becomes clear that the usual alphabetical topic arrangement contains the seed of its own destruction, namely, the inevitable tendency toward excessive multiplication of subjects by new legislation, leading in a relatively short time to a complete breakdown of

whatever elements of organization there may have been achieved in the establishment of the original list of subjects.

On the other hand, the scope and nature of the law of any given jurisdiction is such that its organization in a single truly logical code or compilation is practically impossible. Many of the sequences will necessarily be arbitrary, and insistence on the strictly logical nature of any complete classification will only make some of the arrangements appear ludicrous, and will irritate users. Moreover, a complete logical classification would also give exaggerated importance to many subjects, which, though important units in a grand scheme of statute law, may be in fact of minor consequence in the books. The innumerable gaps in the subjects covered by legislation would alone destroy the symmetry of any attempted logical classification of the statutes of a jurisdiction. Whether unfortunately or otherwise, the fact is that laws are drafted and enacted with only the immediate subject in mind, and without concern for the architecture of the statutory structure.

It does not follow, however, that no logical classification should be attempted, or that the alphabetical topic method may not be utilized in a manner to avoid the defects which are found in typical arrangements of that type. Rather, it would seem that the above considerations indicate that statutory classification should be by the largest possible coherent subjects, these in turn to be arranged alphabetically for convenience. In this way the defects of both systems could be largely avoided, and the advantages of each retained.

The evil of the separation of related material and the splitting of major subjects, characteristic of the alphabetical topic system, varies according to the number and the minuteness of the subjects selected, as the smaller the subjects the greater is the chance of like and related material being separated by the arbitrary sequences forced by the alphabetizing of the subject names. Conversely, the larger the subjects the less chance there is of separation of like and related material. It follows that the best alphabetical topic arrangement is that having the broadest possible, and therefore the fewest possible, subjects. Moreover, the tendency to multiply subjects is reduced in proportion to the broadness of the subjects, because the broader the subjects, the more chance there is of new matter being properly included in an existing subject, which makes for a more stable arrangement. Also, of course, the fewer the subjects the more easily they are remembered, which makes for true ease of reference.

The most important value of the broadness of subjects, however, is that it permits greatest organization or logical arrangement of the material. The more material gathered under a single logically coherent heading the greater is the opportunity to make true classifications and sub-classifications, and to include general and miscellaneous material in satisfactory relationships to the more important provisions.

Logical statutory arrangement is invaluable in (1) assisting in the location of material, (2) assisting in the interpretation of material, (3) bringing unknown material to the user's attention, (4) securing a more complete content, and hence avoiding duplication, conflict, and ambiguity, and encouraging parallel development, (5) saving cross-referring and reliance on memory, (6) bringing related material in juxtaposition, and so helping use and suggesting analogies and parallelisms, (7) avoiding complete dependence on indexes, and in (8) presenting a more satisfactory and comprehensible appearance.

Probably every user of books has often found it easier to locate a particular reference by means of the logical table of contents than by the alphabetical index, and it would seem to be obvious that if an index supplies means of finding desired material by way of key-words alphabetically arranged, the material itself should be arranged on some other principle, such as logic, to furnish another means of locating desired material.

The significance and value of logical arrangement may also be illustrated by comparing the statutory picture to a landscape painting. Each detail could be separately depicted, and would have significance and value as so depicted, but the meaning is enhanced by the grouping. Those who are not interested in the whole picture are free to concentrate their attention on such details as may interest them, while those who desire more than certain details may examine a section or the whole of the canvas as a unit, which they could not do if there had been no grouping. Obviously, the larger and more comprehensive the grouping the more satisfactory will be the results from this point of view.

However, it is quite true that the universe cannot be depicted in detail on a single canvas, and similarly the statutory picture properly requires more than one general canvas. The problem is clearly not that of choosing between the logical or the alphabetical topic arrangement, but that of choosing the broadest possible logically coherent subjects for organizing the legislation of a jurisdiction.

As a matter of fact, everyone recognizes these fundamental principles of statutory classification, but their application is unfortunately limited by the legislative method, which is concerned with relatively narrow subjects. When a thorough revision is undertaken the inclination is to follow the developed habit of using small subjects, and to forget that the value of having small subjects as compared with having isolated details is a value which applies as well to having large subjects as compared with having small subjects.

In selecting subjects for classification purposes the fundamental objective should always be to secure the most *useful* groupings. This means the satisfaction of the greatest possible number of users and potential users of the compilation or revision, which translated means proper regard for the needs and desires not only of lawyers and the official personnel of the government, but also of research workers, and especially of the public as businessmen, as farmers, as citizens, as taxpayers, and generally as individuals with various rights and duties. It also means the consideration of such an apparently trifling but in fact important matter as bulk of content, both to have sizable units for publication purposes as separate booklets or volumes, and to avoid undue emphasis by focusing of attention

on subjects containing only a small amount of material.

Another consideration which should not be overlooked in selecting subjects is the unwisdom of breaking up or changing the names of established and reasonably useful major groupings, unless the reasons for the change are compelling. Needless rearrangement is not only a wasteful procedure, but it is also dangerous, as a certain amount of rewording is required, and removal from an established position is accomplished only at the risk of overlooking general and miscellaneous provisions applying to the material in that position alone, and also at the risk of subjecting the material to reinterpretation because of the new relationships to other material.

Care must also be taken to avoid conflicts and to avoid making a separate main subject of material which is properly a subdivision of another subject, unless the subdivision is in some way made always to appear in print as immediately next in sequence to its main subject.

If the subjects selected can be given titles by which they will automatically be arranged alphabetically in the best possible sequence, so much the better.

Allocation of material to the various subjects is also a part of the classification problem and should be made on the same basis as that recommended for the selection of the subjects themselves, that is, usefulness. Supplementing the tests of usefulness already offered, the following considerations are especially significant for allocation purposes: (1) the proper relationship of materials, to help interpretation, (2) logical position, to help in locating material, (3) interest grouping, to bring together the law of importance to various social and economic classes, and to simplify separate publication materially, (4) customary classification, for convenience, when other tests are not persuasive. Most of the material to be allocated will obviously belong in one definite subject. That which can as well be put in one subject or another under the above tests, can be put in either without hesitation, inasmuch as the index, or the table of contents, will satisfactorily guide the user.

The principles governing the classification or organization of the material allocated to each subject need not be considered here as they are discussed by all texts on draftsmanship. One rule, however, may be worth mentioning, especially because it may be useful as background in selecting the main subjects. This rule applies only to material which is administrative in character or which has administrative features—it does not apply to purely substantive law. The rule may be stated as follows: Prefer an arrangement under each subject which will group the materials in operative or enforcement units, rather than one which will group the materials according to methods or devices employed. The only way to explain this rule is to illustrate it, so the following analogy and example are offered: the analogy is to bring the parts of six automobiles together to make six automobiles, and not to make piles of six radiators, six motors, etc.; the example is to keep the law regulating banks, the law regulating insurance companies, and the law regulating building and loan associations (if these have separate and distinct provisions and enforcement machinery) as units under the main subject, and not to break them up according to such groupings as What May Be Advertised, Deposit Requirements, and Unlawful Acts of Officers. This is not to say that grouping according to devices or methods should never be employed, but is offered simply as a rule of preference, other things being equal. If a devices grouping is demonstrably more useful, it should be used, as for example when exactly the same device (e. g. notice provisions) is used in more than one operative or enforcement unit, and a single separate statement of the device can take the place of the repetition that would otherwise be required.

In brief, statutory classification should be by the largest possible, logically coherent, useful subjects, as determined by the materials and the interests of the jurisdiction, and each subject should include all material which can usefully be put there, and should be logically organized.

These, it is submitted, are the principles of statutory classification. Their application necessarily means different arrangements in different jurisdictions, to best serve local needs. This would seem to exclude any standard or uniform classification, applicable to all jurisdictions alike. Nevertheless, considerable uniformity can be expected as the main body of subjects will probably prove suitable for practically all similar jurisdictions and will be adopted accordingly as revisions are undertaken. Such a natural and flexible standardization can be achieved without sacrificing the values on which the principles discussed herein are based, and will secure many of the important values of a uniform classification. For the rest, other devices are available, such as comprehensive indexes and special-subject compilations. In the United States there is real need for a National Statutes System to do for legislation what the National Reporter System does for court decisions.

Elements in Value of Legal Services

In the *Matter of Potts*, 213 App. Div. 59, 209 N. Y. S. 655, the Court, in discussing the value of legal services, said:

"In general, the court, in determining the justice and reasonableness of an attorney's claim for services, should consider the time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained (citing cases).

"The value of an attorney's services cannot be limited to "specified and detailed bills of particulars with a specified amount for each item, as in the case of goods sold, or mere manual services rendered' (citing cases).

"That is necessarily so, for the real value of an attorney's services may be the result of his thought about the legal questions involved, while away from his office, at home, or elsewhere. An idea thought out in bed at night may be the most valuable part of an attorney's services and may constitute a solution of the vital questions involved in a litigation.

"The standard by which the value of such services is measured is, however, the fair and reasonable value of the services rendered after considering the various elements referred to. I do not think items as to time actually employed in work on the case are of much importance. It is the ability of the attorney and his capacity and success in handling large and important matters and in commanding large fees therefor, the amount involved and the result obtained, which are of prime importance in determining what constitutes a just and reasonable charge."

What Is a Bankruptcy Act?

BY MAX RADIN
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IN THE cases of Pobreslo v. Boyd Co., 287 U. S. 518, 77 L. Ed. 343, 53 S. Ct. 262, and in the case of Johnson v. Start, 287 U. S. 527, 77 L. Ed. 346, 53 S. Ct. 265, both decided in 1933, an ancient problem is once more presented. What makes a law a bankruptcy law?

It is not a purely academic question. If a law is not a bankruptcy law, Congress has no power to pass one for the States. If a state statute is a bankruptcy law, it is suspended in whole or in part by the passage of a Uniform Federal Bankruptcy Act.

Most of the discussion of the question has dealt with persons. Some classes of persons are excepted from the provisions of the Federal Act. May they be adjudicated in accordance with a state bankruptcy act? The point is largely one of interpretation. Did the Federal Act create an exemption for this class, or did Congress merely decline to legislate about them? The question in the Pobreslo and Johnson cases (supra) and in the case of International Shoe Co. v. Pinkers, 276 U. S. 261, 49 S. Ct. 188, 73 L. Ed. 318, is a different one. Are there any positive distinguishing marks which enable us to recognize a bankruptcy statute under such common disguises as "General Assignment Acts," "Creditors Acts" and the like?

In the three cases above mentioned, the decision rested on the "discharge" feature. Where a discharge of an insolvent debtor from all or part of his debts is provided for, the statute is one of bankruptcy. No one of these cases went so far as to declare that this was the sole test. In a criticism of the Pobreslo case (8 Wis. Law Review 282-283) it was suggested that the "involuntary" provision of the Wisconsin statutes, (128.08) was also a bankruptcy law and should have been so classified.

Certainly there were statutes that called themselves bankruptcy statutes before the first provision for discharge appeared in the Statutes of Anne, 4 Anne. C. 17, (1705) and 10 Anne. C. 15 (1711). It would, however, not quite follow from this fact, that the term "bankruptcy" as used in the Constitution and in common legal speech, could be made to include a statute without a provision for discharge.

Modern bankruptcy involves the collection and impounding of the bankrupt's property—in accomplishing which he can be compelled to assist—the administration of the property so gathered by a receiver or trustee under the supervision of a court and its distribution ratably to various classes of creditors with or without a preferential sequence among them. Added to all this is provision for the discharge of the debtor. Are all of these essential? Or rather, can any one of these exist in a statute which is not a bankruptcy act?

It may be noted, first of all, that the terms "involuntary" and "voluntary" are misleading. As used in the Federal Act and in most legal discussions of the subject, "voluntary" merely means that the proceedings are initiated by the debtor and "involuntary" that they are initiated by one or more creditors. Many of the stages of the "voluntary" proceedings are taken against the will of some or all of the persons involved, or better, without any consideration of their willingness. Indeed, it may well be said that more unwilling persons are present at "voluntary" than at "involuntary" proceedings.

In their ordinary sense, however, the willingness or unwillingness of the persons is not without its significance. As far as the debtor is concerned, his willingness is surely irrelevant. Whether he does or does not initiate the proceedings, he will be examined as to his property and it will be taken from him and turned over to a fiduciary. He may resist and he sometimes does resist, but his resistance will be disregarded. As to the distribution of the estate, he will not even be heard.

But that is also true in proceedings that are not bankruptcy at all. Any creditor can get a judgment, and, if it remains unsatisfied, institute supplementary proceedings or sue out a bill in equity, by which all the debtor's property within the court's jurisdiction will be collected, turned over to a receiver, and sold to satisfy the judgment. The debtor may, against his will and despite his resistance, be examined in order to assist this process.

Not only may one creditor do so, but several or all of his creditors may join in doing so. Or their assignee or representative may do so. And in that case, the court will order a ratable distribution, taking into account the priority statutes of the state and the state exemption laws, but taking into no account the wishes or desires or assent of the debtor. As far as the debtor is concerned, the proceeding is quite involuntary.

We cannot, therefore, use "involuntary" in either its actual or in its special sense, as a test of bankruptcy, since no one assumes that creditor's bills, sought by a group of creditors, or supplementary proceedings jointly undertaken by a number of creditors, constitute bankruptcy. And yet it has been properly said that "the creditors of an insolvent debtor by means of such procedure, (i. e. bankruptcy) can reach nothing that a single creditor could not have touched under execution or judgment creditor's bill," (G. Glenn, Creditors Rights and Remedies, p. 17). A statute that makes this possible and no more, is not a bankruptcy statute, even if it abolishes the equity requirement that the claim must first be reduced to judgment.

But suppose one or a few creditors attempt to use this equitable procedure and others do not? Can any creditor be forced to do so, except in a bankruptcy court? Of course, he cannot be bound to a composition without his consent. That brings in the element of discharge. But can he even be compelled to share in the creditor's proceedings, if he does not wish to?

In other words, suppose creditors A and B undertake by creditors' bills to impound all the debtor M's property and distribute it ratably among all creditors. Before the property is reached C and D, non-assenting creditors, can still get independent judgment and levy on M's property. The lien of such levy or judgment will undoubtedly attach to the property when it is taken under A's and B's bill.

If a statute prevents that, if it compels C and D to relinquish their lien or enjoins them from proceeding except in concert with A and B, then it does seem to be a bankruptcy statute, whether the debtor may be discharged or not. And a state statute that provides for this compulsion is suspended while the Federal Act is in force.

It is, therefore, not the discharge but the coercion which is the test. And the coercion is always exercised against one or more of the creditors, not against the debtor. It might be well for reasons of terminology to avoid the term "involuntary." The test of coercion is simple, unique and easily applied.

State and Municipal Liability in Tort-Proposed Statutory Reform

(*Continued from Page 752*)

state, county, city, municipal corporation, school district, district established by law, and other political subdivision, respectively, acting within the scope of his authority; or (2) proximately caused by any defect or insufficiency in any machinery, vehicle, or appliance, provided such defect or insufficiency was due to the wrongful or negligent act or omission of such officer or employee.

No claim shall be allowed for any such injury or death to the extent that the injury is continued or aggravated or that the death is caused by an unreasonable refusal or negligent failure to submit to or procure medical or surgical treatment, as may be required by the State Administrative Board (or other appropriate officer).

SECTION 4. (a) The amount allowed for personal injury shall be paid to the injured individual, except that if the individual dies before such amount shall have been paid, the same shall be paid as in the case of a claim for death. But no claim on account of personal injury shall be heard or allowed if the person injured shall have died.

(b) A claim on account of death shall be allowed and paid as follows:

(1) Such claim shall be allowed only for death caused by injury and occurring within three years after the injury; but no allowance shall be awarded where the death takes place more than one year after the cessation of disability resulting from such injury, or (in the absence of any such disability preceding death) more than one year after the injury.

(2) The compensation shall be allowed and paid to the following beneficiaries:

(A) To the widow, or widower, or if there is no widow or widower, then to the children, share and share alike. Compensation to a child shall not be allowed unless the child is unmarried and is either under eighteen years of age or, having reached the age of eighteen, is physically or mentally incapable of self-support. Compensation for a child under eighteen years of age shall be paid to the legal guardian.

(B) If there be no beneficiary entitled under subdivision (A) then to any parent or grandparent or brother or sister who was totally or partially dependent for support upon the deceased at the time of his or her death, having due regard for the extent of the dependency in cases of partial dependency under this paragraph.

(3) The total compensation which may be allowed on account of any one injury, or injury and death caused thereby, shall not exceed $7500.

(4) The right of a beneficiary to compensation for death shall not survive the death of such beneficiary.

(5) As used in this section—

(a) The term "child" means (1) a legitimate child, (2) a child legally adopted prior to the death of the deceased, (3) a stepchild, if a member of the deceased's household at the time of his death, (4) a posthumous child, and (5) an illegitimate child, but as to the father, only if acknowledged in writing by him, or if he has been judicially ordered or decreed to be the putative father of such child.

(b) The term "widow" means the deceased's wife, living with or dependent for support upon him at the time of his death, or living apart from him at such time because of his desertion.

(c) The term "widower" means the deceased's husband living with her at the time of her death.

(d) The term "parent" means a father, mother, father or mother through adoption, stepfather, stepmother, and persons who have stood in loco parentis to the deceased for a period of not less than two years just prior to his or her death.

(e) The term "grandparent" means a grandfather or grandmother.

SECTION 5. No claim shall be considered under this Act unless notice thereof, setting forth the time, place, and cause of the alleged damage or loss shall be presented in writing by the claimant, or in the case of a joint claim, by any one of the claimants, to the State Administrative Board if caused by an officer, commission, department, board, institution, agent, or employee of the state, or to the executive officer of the county, city, municipal corporation, school district, district established by law, and other political subdivision, respectively, if caused by an officer, commission, department, board, institution, agent or employee of such county, city, municipal corporation, school district, district established by law, or other political subdivision, as the case may be, within thirty days from the date of the occurrence of the event that is the basis of the claim.

SECTION 6. No claim shall be allowed in the event that the claimant or his principal, or any agent, servant, or employee of any of them, was guilty of contributory negligence, or in the event that the damage or loss is proximately caused by the intoxication or willful misconduct of any such person. But the fact that the claim arose out of what may be denominated a governmental function shall not be a bar to any claim.

SECTION 7. Any assignment of a claim under this Act shall be void, and all payments on account of personal injuries or death pursuant to this Act shall be exempt from all claims of creditors.

SECTION 8. Where the amount claimed is in excess of $2500, the claim shall be filed, as hereinafter provided, with the State Administrative Board, and also, if it arose out of a wrongful or negligent act or omission charged to an officer, commission, department, board, institution, agent, or employee of a county, city, municipal corporation, school district, district established by law, or other political subdivision, with the said county, city, municipal corporation, school district, district established by law, or other political subdivision, as the case may be. If the claimant does not accept the amount, not in excess of $2500, allowable by the said authorities, as provided in section 2, he may, within six months of the filing of his claim or within six months of the date of the decision referred to in section 15, institute an action against the state, county, city, municipal corporation, school district, district established by law, or political subdivision, as the case may be, in the Court of Claims of the state or other court of competent jurisdiction, (but jury trial shall not be permissible).

SECTION 9. Any claim allowed under this Act in excess of $1000 shall be certified by the State Administrative Board or the Court of Claims, as the case may be, when not directly chargeable to or payable by the county, city, municipal corporation, school district, district established by law, or other political subdivision, out of the funds at its disposal, to the state legislature for its consideration and action, and such certificate shall contain a brief statement of the facts and the reasons for the allowance of the claim and for deductions, if any. Any amount found due and paid under this Act shall forever discharge the state or the county, city, municipal corporation, school district, district established by law, or other political subdivision, as the case may be, by or in respect of which the payment is made, from any claim or demand on account of the damage or loss involved in the said claim. The right of either House of the legislature is expressly reserved to return to the State Administrative Board any claim settled by it for further examination and report, or to refer any such claim to the Court of Claims for further investigation to determine the facts and report its conclusions thereon. Before any claim is paid, there shall be withheld from the amount allowed the amount of any liquidated claim of the state, county, city, municipal corporation, school district, district established by law, or other political subdivision, as the case may be, held against the claimant.

SECTION 10. In the case of a county, city, municipal corporation, school district, district established by law, or other political subdivision, having a gross revenue from taxation from all sources of less than $250,000 per annum, the said county, city, municipal corporation, school district, district established by law, or other political subdivision shall contribute to the general fund of the state an amount per annum not less than two per cent of its gross revenue from taxation from all sources, in lieu of direct liability for private claims established by this Act; but in that event, the settlement, adjustment, and allowance of claims against the said subdivision shall be reviewed and may be revised by the State Administrative Board, and all suits arising out of the claim shall be brought against the state jointly with the county, city, municipal corporation, school district, district established by law, or other political subdivision primarily liable.

SECTION 11. The provisions of this Act shall not apply to—

(a) Any claim for loss, damage, or destruction of property or for injury or death incurred by any member of the militia or National Guard when called into the service of the state or by any officer or employee of the state.

(b) Any claim for injury to or death of a prisoner.

(c) Any claim arising out of any alleged wrongful or negligent act or omission of any employee of any state, county or municipal hospital, dispensary, or institution, or of any physician, surgeon, nurse, or orderly in connection with the rendition of medical or surgical treatment.

(d) Any claim for injuries or death arising out of assault, use of excessive force, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, interference with contract rights, or any criminal act.

(e) Any claim on account of the effect or alleged effect of any Act of the legislature or Executive order of the Govern-

ment, or of any ordinance, administrative order, or regulation of any commission, department, board, institution, agent, or employee of the state, county, city, municipal corporation, school district, district established by law, or other political subdivision of the state.

SECTION 12. If the damage, loss, injury, or death is caused under circumstances creating a legal liability upon some person other than a public officer, commission, department, board, institution, agent, or employee of the state, county, city, municipal corporation, school district, district established by law, or other political subdivision of the state, as the case may be, to pay damages jointly with the state, county, city, municipal corporation, school district, district established by law, or other political subdivision of the state, then and in that event the recovery against the state, county, city, municipal corporation, school district, district established by law, or other political subdivision of the state shall be only for its proportionate share of the damages.

SECTION 13. The State Administrative Board shall provide rules and regulations for the investigation and report of any accident, happening, or event which may become the basis of a claim under this Act and for the filing of notices and of claims of injuries, damages, or losses. Such rules and regulations shall have as their purpose a uniform administration of this Act throughout the state and by all counties, cities, municipal corporations, school districts, districts established by law, or other political subdivisions of the state.

SECTION 14. Before the State Administrative Board or the authorized board or council of any county, city, municipal corporation, school district, district established by law, or other political subdivision of the state may settle and adjust any claim under this Act, the claimant shall file a formal claim verified by the claimant under oath within six months after the occurrence of the event that is the basis of the claim, setting forth in detail all of the facts relied on in support of the claim, and specifically the alleged wrongful or negligent acts or omissions on which it is based, and a copy of the notice filed under the provisions of section 5 and the rules and regulations issued under section 13.

SECTION 15. The Court of Claims (or other board or court provided by the state) shall have jurisdiction to hear and determine any claim in excess of $2500 allowable under the provisions of this Act, subject to the following limitations: (1) That no such suit may be maintained until the claim has been duly filed with the State Administrative Board or with the county, city, municipal corporation, school district, district established by law, or other political subdivision of the state and its decision had thereon: *Provided*, That if such decision be delayed more than four months from the date of filing, then the suit may be brought without awaiting such decision; (2) that no suit shall be instituted after the expiration of six months from the date of such decision and the mailing of a copy thereof to the claimant. The State Administrative Board shall have the power and authority to compromise any claim, in an amount not exceeding $2500, at any time prior to the rendition of final judgment by the Court of Claims, and any such claim shall be certified, as provided in section 9. The Supreme Court may on certiorari review all judgments rendered by the Court of Claims under this Act.

SECTION 16. No claim shall be allowed under this Act on behalf of any insurance company by right of subrogation where the claimant was insured against the loss sustained: *Provided*, That in the event that any claimant under this Act shall be protected by insurance against any damage or loss involved in such claims, the amount of insurance collected or collectible by him shall be deducted from the amount allowed or allowable under this Act.

SECTION 17. The state, county, city, municipal corporation, school district, district established by law, or other political subdivision of the state shall have the right to be reimbursed by any officer, agent, or employee willfully causing the damage or loss giving rise to any claim against the state, county, city, municipal corporation, school district, district established by law, or other political subdivision of the state under this Act.

SECTION 18. In any claim under this Act where recovery is had, the fees of the claimant's attorneys shall be in such reasonable sum, not exceeding twenty per cent of the amount recovered, as shall be fixed by the State Administrative Board or the Court of Claims or by the county, city, municipal corporation, school district, district established by law, or other political subdivision of the state, as the case may be. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount other than that allowed under this section or who shall solicit directly or indirectly any claim under this Act shall upon conviction thereof be subject to a fine of not more than $1000 or imprisonment for not more than one year, or both.

SECTION 19. No claim shall be allowed under this Act to any person who shall willfully, knowingly, and with intent to defraud have claimed more than was justly due in respect of such claim or shall have presented any false evidence in support thereof.

SECTION 20. Any claim for damage to property arising under the terms of this Act where the amount of injury is claimed to be in excess of $25,000 shall be submitted to the legislature, which may, however, refer the said claim to the Court of Claims for investigation and hearing and report to the legislature.

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California

Large and Representative Gathering at Annual Convention of California State Bar—Legislature Urged to Create Crime Commission to Recommend Constructive Program—Attorney's Lien Law Rejected

The Seventh Annual Convention of the State Bar of California was held at Pasadena on Sept. 20-22. With 647 members in attendance—according to the report in the State Bar Journal for October, from which the material for this account was taken—it was not only one of the largest but, by general agreement, one of the most representative meetings ever held.

The convention was called to order by President Hubert C. Wyckoff at ten o'clock in the Convention Auditorium of Hotel Huntington at Pasadena. His presidential address was listened to with close attention and was warmly applauded. He dealt at length with Admission to Practice, Discipline, Unauthorized Practice, Ambulance Chasing and Improvement of the Administration of Justice. Finally, under the caption of Retrospect and Prospect, he became pleasantly personal concerning the history of The State Bar, paid an unstinted tribute of appreciation to his colleagues, and concluded on a note of sober optimism concerning the future.

John Perry Wood of Los Angeles presided at the afternoon session. Announcement of the results of the 1934 election of Governors and administration of the oath of office by the Honorable Wm. H. Waste, Chief Justice of the Supreme Court, to members-elect Bartlett, Luce and Rowland, was one of the main features.

The report of the Committee of Bar Examiners was submitted by Alfred L. Bartlett, chairman. There was a general discussion of the work of the Conference of Law School Instructors. Among those taking part were Robert L. McWilliams of San Francisco, Dean Owens of the University of Santa Clara, and Will Shafroth, Adviser to the President of the American Bar Association.

At the night session President Wyckoff introduced Eugene Daney of San Diego as presiding officer. Mr. Daney told the story of the Alexander F. Morrison Foundation and introduced the Morrison speaker, Will Shafroth of Denver, who read a paper on "New Prospects for Bar Accomplishments."

President Wyckoff introduced Theodore P. Wittschen as the presiding officer for the Friday morning session.

Mr. Wittschen presented the newly elected officers of the Conference of Bar Association Delegates: Thomas C. Ridgway of Los Angeles, president; F. M. McAuliffe of San Francisco, first vice-president; Harrison Ryon of Santa Barbara, second vice-president; Dudley Harkleroad of San Francisco, secretary; and August J. O'Connor of Los Angeles, E. C. Farnsworth of Visalia, and Gerald Hagar of Oakland, executive committee.

On behalf of Chairman O. K. Cushing of San Francisco, Norman S. Sterry of Los Angeles commented at length on the report of the Committee on the Administration of Justice, already presented to the convention, and moved its adoption. After a brief discussion the report was adopted.



NORMAN A. BAILIE
President, California State Bar

The report recommended, among other things, a resolution urging the Legislature at its 1935 session to "create a commission of five to nine members, unsalaried, of a representative character, and with an ample appropriation to enable the commission to investigate and recommend a constructive program to be followed in dealing with the crime problem in California."

It also told of what had been done by its subcommittees on Criminal Procedure, on Civil Procedure, on Courts and Judicial Officers, and on other subjects. Under the head of "Subcommittee on Public Relations" occurs this unusual piece of information:

"The State Department of Education, headed by Vierling Kersey, Superintendent of Public Instruction, some time ago expressed a strong disapproval of the irresponsible and often unfounded criticism of courts and lawyers. It was suggested that a manual be prepared for use in the schools to substitute for uninformed criticism an informed and constructive discussion. This Committee immediately seized upon the opportunity, and work on a manual has been proceeding under the direction of Arnold Praeger, as chairman of a sub-committee on the Preparation of a School Manual, with the active cooperation of Mr. Kersey and of Mr. Alfred E. Lentz, Administrative Advisor in the State Department of Education."

The committee's report also recommended enactment of Initiative Constitutional Amendment No. 3 and Assembly Constitutional Amendment No. 98, relative to the selection of judges; of the proposed Constitutional Amendment permitting the court to comment on the evidence and the court and prosecutor to comment on the failure of the defendant to testify; of the proposed Amendment increasing the powers and duties of the Attorney General; of the proposed Amendment permitting a plea of guilty before the committing magistrate.

Robert L. McWilliams of San Francisco addressed the convention on "English Appellate Practice," his remarks being received with much appreciation. After he had concluded, Mr. Thomas C. Ridgway presented the report of the Conference of Bar Association Delegates. The report consisted mainly of recommendations on a number of matters which had been referred to it and these were generally approved by the convention.

Among the resolutions thus approved were the following: requesting the Board of Governors earnestly to consider a statewide public relations program on behalf of the State Bar for the year 1935 and to appropriate sufficient money to continue such a program, if adopted; disapproving Assembly Constitutional Amendment No. 73, providing for division of counties into Superior Court districts and for election of judges from each district; request-

ing appointment of a State Bar Committee to investigate certain specified evils growing out of the foreclosure of bond issues; recommending that the Board of Governors request each local bar association to certify counselors for appointment by the Board, whose duties shall consist of consulting with and advising recently licensed attorneys as to matters of legal ethics, placement and location.

There was one exception to the general approval and that was in connection with the recommendation for the enactment of a new section 1021a of the Code of Civil Procedure to provide for an attorney's lien. The convention disapproved this proposal which had been strongly recommended by a Committee on Attorney's Lien Law and approved by the Conference of Bar Association Delegates.

The report of the Conference of Bar Association Delegates contained endorsement of certain recommendations of various committees which had been referred to it for consideration. The Association proceeded to approve them. Among the committee proposals thus approved were two which had been recommended by the Committee on Practice and Procedure before the Industrial Accident Commission. One of these favored legislation permitting the Commission to assess attorney's fees against employers as a part of the award in cases held before it, and the other favored legislation (unless the Commission voluntarily adopted such a rule) providing that medical reports be made available to claimants within a reasonable time prior to the time of hearing.

A. G. Bailey of Woodland presided over the Friday afternoon session which was devoted to discussion of resolutions and action upon them.

The California Judges' Association report was presented by Judge Lawrence N. Turrentine of San Diego, who had presided at the judges' conference.

Among the resolutions acted upon was one supporting a proposal to liquefy the frozen assets of lawyers and doctors by the creation of a Federal agency. The resolution was defeated.

Leonard B. Slosson presided at the final session of the convention, held on Saturday morning. Ernest S. Williams of Los Angeles addressed the convention on Procedure in State Bar Disciplinary Cases. The session came to a close with an address by Governor Merriam, who was most cordially received and applauded.

The annual banquet was held Friday night, with President Wyckoff presiding. He stated that representatives of the State Federation of Labor had come to return the greetings of The State Bar, and introduced Paul Scharrenberg, the secretary of the State Federation. Mr. Scharrenberg announced that he was "pinch hitting" for the newly elected president, Edward D. Vandeleur, who had been called to San Francisco. He was followed in addressing the banquet by E. W. Hoch, the retiring president of the State Federation. The evening concluded delightfully with entertainment provided by the Orange County Bar Association, with Frank C. Drumm acting as toastmaster.

The organization meeting of the Board of Governors was held on Friday, September 21. The retiring President, H. C. Wyckoff, Esq., presided and the following members of the Board were present: Messrs. Bailie, Bartlett, Belcher, Bourquin, Hart, Luce, Reinhaus, Rowland, Seiler, Siemon, Tinning, Tramutolo, Wittschen, Wood, Wyckoff.

The following officers were unanimously elected: President, Norman A. Bailie, Esq., Los Angeles; Vice-Presidents, Richard Belcher, Esq., Marysville; Oscar J. Seiler, Esq., Long Beach; Chauncey Tramutolo, Esq., San Francisco; Treasurer, M. Mitchell Bourquin, Esq., San Francisco.



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District of Columbia

District of Columbia Bar Association Inaugurates Fight Against Local Crime Conditions—Acts to Implement American Bar Association's Program

The District of Columbia Bar Association has taken the leadership in the local fight against crime conditions in the nation's capital and is also vigorously cooperating in carrying out the criminal law recommendations of the American Bar Association.

At the luncheon to the President of the American Bar Association given on October 25th, President Noel of the Bar Association of the District of Columbia announced the appointment from his Association of a special Committee on Crime who were directed to meet and act respecting the crime condition in Washington with a view to cooperating in the program of the American Bar Association. This proposal received the immediate enthusiastic endorsement not only of President Loftin of the American Bar Association but of the Attorney General, United States District Attorney Leslie C. Garnett and of Corporation Counsel E. Barrett Prettyman.

On Monday, October 29, through the courtesy of the Hotel Mayflower, its ballroom was turned over to a mass meeting of citizens called by the District Bar Association's Committee on Crime. At that meeting one of the Commissioners, the United States District Attorney, the Corporation Counsel and the Chief of Police, together with numerous representatives of civic associations, spoke concerning the existing crime situation in Washington and possible remedies. The appointment of an organization group to effect the creation of a permanent Committee on Criminal Justice for the District of Columbia was announced. The members of this group consisted of the President of the Bar Association of the District of Columbia (Mr. F. Regis Noel), the President of the Federation of Citizens' Associations of the District of Columbia (Mr. James G. Yaden), the President of the Federation of Business Men's Associations (Mr. Arthur C. Smith), the Chairman of the mass meeting (Mr. Robert Netherland Miller) and Mr. Frank S. Bright.

On Monday, November 5, this organization group, through its Chairman, Mr. Miller, reported to the District Bar Association's Committee on Crime that nine persons were proposed to serve on the permanent committee for a period of five years with power in themselves to fill any vacancies occurring in their ranks. The following were the persons so named: Mr. F. Regis Noel, Mr. George W. Beazley, Mrs. M. O. Chance, Mr. Paul B. Cromelin, Dr. Arnold Bennett Hall, Mr. Claude Owens, Mr. Seth Richardson, Mr. Arthur C. Smith, Mr. James G. Yaden.

After careful consideration, lasting some hours, the Committee on Crime of the Bar Association unanimously endorsed the report of the organization group and resolved that such a permanent Committee should be created. Thereafter, the permanent Committee met on Thursday, November 8, elected F. Regis Noel as its Chairman and C. Chester Caywood as its Secretary. The Committee also decided that it should be called "The Citizens' Committee on Crime." Assignments of topics for preliminary investigation and report by the members of the Committee were determined upon and it immediately began to function.

On Monday, November 12, the Committee on Crime of the District Bar Association met and passed a resolution assuring the Citizens' Committe on Crime of the continued sponsorship and cooperation of the Bar Association's Committee and expressing its happiness to receive such reports as the Citizens' Committee might care to make from time to time. The President of the Bar Association of the District of Columbia was also requested to appoint at once Committees on Criminal Procedure and Police and Prosecution from the membership of the Association.

Observers have said that the District Bar Association has acted with an unusual expedition in giving form to a community demand; that notwithstanding the promptness of the action, there has been an absence of hysteria which has gratified the members of the Bar. In addition, the lawyers of the community by this action have taken the lead in a field in which their leadership is appropriate. An agency has been created which is a reasonably satisfactory adaptation of a national movement to the peculiar political structure of the District of Columbia. With its own committees working on criminal procedure, police and prosecution, it is expected that the Bar Association not only will work closely with the Citizens' Committee but will lend to that enterprise a support and endorsement which should be of incalculable value to it.

Mississippi

Meeting Characterized by Unity of Purpose to Augment Activities of State Bar—Recommendations as to Proposed Judicial Council Bill Presented

The annual meeting of the Mississippi State Bar was held at Hattiesburg, Mississippi, on September 6th and 7th, with an attendance of approximately 300 members.



MAJOR W. CALVIN WELLS
President, Mississippi State Bar

The meeting was called to order by the President, Judge J. H. Price of Magnolia. It was formally welcomed by Hon. W. S. F. Tatum, Mayor of the City, and Hon. Paul B. Johnson, President of the Forrest County Bar, with the response to this welcome, on behalf of the Bar, by Hon. J. W. Dulaney of Tunica. This was followed by the address of Judge Nathan P. Bryan, Justice of the United States Circuit Court of Appeals of the Fifth Circuit, who spoke on "the Mission of the State Bar Association." Judge Bryan ably discussed the work and objectives of the Bar Association and the problems of the legal profession generally.

Other addresses on the program were made by Judge Sidney Smith, Chief Justice of the Supreme Court of Mississippi, Hon. J. Morgan Stevens, former Associate Justice of this Court, Hon. Greek L. Rice, Attorney General of the State of Mississippi, and Hon. L. Barrett Jones.

Judge Smith spoke at length upon the work of the Law Institute, discussing the Mississippi Annotations which have been completed on the subject of Contracts and Agency. He emphasized the importance of the restatement of the law in unifying and making more certain the rules and application of the Common Law.

The subject of Judge Stevens' address was "Legal Ethics," which he handled in a most masterful fashion, applying it to the everyday problems of the profession.

The problems of Criminal Law enforcement were analyzed by Gen. Rice,

who suggested some possible solutions of deep interest to the Bar.

Mr. Jones presented a striking address on the relation of the State Bar to the American Bar Association, and showed the close relationship that exists between these two bodies.

Hon. Barney Eaton of the Gulfport Bar was unable to attend and a very careful paper prepared by him on Federal and State statutes and decisions was read by his son, Hon. Barney Eaton, Jr., also a member of the Bar. This paper presented a very timely discussion of the trends and aims of recent legislation.

A report on the progress of the Law School at the University of Mississippi was made by its Dean, Judge T. C. Kimbrough.

Hon. Louis Jiggitts, for the Board of Commissioners, presented its recommendations as to the proposed Judicial Council Bill; and the Secretary of the State Bar, Hon. Walter W. Capers, gave a report on the progress of the State Bar.

Major W. Calvin Wells, a leading member of the Jackson Bar, was elected President for the ensuing year. Major Wells has long and earnestly worked for the development of the Bar and it is fitting and proper that his election should come at this time.

Hon. James McClure of Sardis, and former Governor Earl Brewer of Jackson, were elected First and Second Vice-Presidents, respectively.

The Bar meeting was marked by the unity of its membership in seeking with increasing purpose to augment the activities of the State Bar to the benefit of the legal profession, Courts, and the public as well.

The members of the Hattiesburg Bar were most gracious hosts and all visitors were delightfully entertained.

The 1935 annual meeting of the Bar will be held at Natchez on September 5th and 6th.

WALTER W. CAPERS,
Secretary

Missouri

Missouri Bar Association Holds Fifty-fourth Annual Meeting — President Barrett Calls for Action on Organized Crime Problem—Committee on Welfare of Bar Presents Significant Report

The Fifty-fourth Annual Meeting of the Missouri Bar Association was held at St. Louis on Sept. 28, 29. It was called to order by President Jesse W. Barrett and the invocation was delivered by the Rev. Ivan Lee Holt. The address of welcome was delivered by Mr. Kenneth Teasdale, President of the St. Louis Bar Association.

President Barrett's address dealt mainly with matters of current interest. He spoke of the new plan of Bar control which had been secured following the State Supreme Court's decision in the Richards case; the victory which had been won in the courts this year with respect to the unauthorized practice of law; the study of the Workmen's Compensation Act which had been undertaken to determine whether it is achieving its avowed purposes; the close cooperation which had been maintained with the American Bar Association and the local Bar Associations; and of other activities of the past year.

"Summarizing," President Barrett continued, "it will be seen that within this official year we have disposed of a large part of our docket and are now ready to call up other matters long pending. Having put the first things first, we have successfully completed our struggle for a practical integration and unified control of our bar, although there is yet much to do in setting the new plan to work. Having likewise secured the provision therein for the establishment of a Judicial Council, we will be able to do much toward the reform of civil procedure. The new system of bar control and the betterment of civil procedure go a long way toward the performance of our tasks, but there is one more insistent demand which the public makes upon us, and that is with respect to the enforcement of the criminal law."

Reports of the Secretary and Treasurer followed, after which President Barrett called Governor Caulfield and the other members of the Supreme Court Commission to the platform. They were introduced to the audience, which received them with enthusiastic applause indicative of general appreciation of the work they had performed in connection with the adoption of the Bar control plan. Governor Caulfield made a brief address. The Association by a rising vote extended its thanks to the Commission, individually and collectively, for the great work it had done.



HON. FRANK E. ATWOOD
President, Missouri Bar Association

Mr. John H. Caruthers of St. Louis, one of the delegates of the Association to the Junior Bar Conference at Milwaukee on Aug. 27, presented a report

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showing the organization and purposes of the Conference.

At the second session a resolution was passed endorsing Hon. Charles B. Faris for the vacancy in the United States Circuit Court of Appeals for the Eighth Circuit, due to the death of Hon. William S. Kenyon. Judge Faris is now U. S. District Judge for the Eastern Division of the Eastern Judicial District of Missouri. The resolutions urged his appointment on the ground of his faithful and efficient service, his judicial experience and high qualifications.

Hon. Rush H. Limbaugh, of Cape Girardeau, delivered an able address on "The Growth and Effect of Administrative Agencies and Regulations." Hon. J. Hugo Grimm, of St. Louis, followed with an address on "The Forgotten Stockholder."

Reports of Committees followed. The report of the Committee on Grievances and Legal Ethics records the curious case of a complaint against a man who was enrolled in the Circuit Court as a lawyer, but who had never been licensed to practice. It seems that he presented a certificate, bearing the seal of the Supreme Court, to the effect that he had been licensed to practice and was thereupon enrolled. Investigation showed, however, that the name of the original and genuine licensee had been removed by chemicals and the name of the imposter inserted. The Committee on Incorporation of the State Bar recommended that no further action be taken to secure Bar organization by Legislative enactment and that the Committee be discontinued. The recommendation was adopted. Consideration of a proposed constitution for the Association, submitted by the committee, was deferred until some future meeting.

The Committee on Judiciary and Procedure recommended that the Association endeavor to ascertain whether or not it is the consensus of opinion of the Bar of the State that candidates for Judicial offices be nominated and elected separately from candidates for other offices; and if so, to take appropriate steps to secure the adoption of such system. Adopted. Other reports dealing with important aspects of the Association's activities followed, after which Hon. Henry Upson Sims, former President of the American Bar Association, delivered an address on "The Work of the American Law Institute." Mr. Sims was received with great applause. His address was appropriately followed by a report showing the work that had been done on Missouri annotations to the Restatements of the Institute.

The report of the Committee on the Welfare of the Bar, a special committee appointed by President Barrett, was unusually interesting and informative. The committee was appointed to investigate and consider the general conditions prevailing in the practice; to consider some of the practical business questions of the profession; and to find out how by cooperation the profession's interests may best be served. In pursuance of these objects it sent out a questionnaire to members of the Missouri Bar designed to secure information as to the earnings of lawyers for the past five years; an expression from lawyers as to the practical business problems with which they are confronted; and views as to what, if anything, can be done to improve the position of lawyers as a group.

The questionnaire was sent to the 1,700 members of the Missouri Bar Association and replies were received from 237, or approximately 14%. The report states that the committee recognizes the fact that the answers to the questionnaires cannot be regarded as an exact and comprehensive summary of the situation, but it nevertheless feels that the data compiled from these answers is significant and sufficiently informative

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to merit serious consideration and appropriate action by the Bar. The report gives a tabulation of the data assembled and concludes with the following recommendations:

(1) It is evident from the response of the Bar to this questionnaire that the members of this Association believe the Association should through a special committee devote itself to the practical professional problems of lawyers, and accordingly recommends that a Committee on the Welfare of the Bar be established as a permanent standing committee of the Association.

(2) That this committee be directed to prepare and submit to the membership of the Association for consideration and approval a proposed schedule of minimum fees for those classes of service lending themselves to such treatment.

(3) That in the interest of lawyers and the public, this committee be directed to study and make definite recommendations for the dispatch of litigation. (When that was written we were not aware of the fact we now have a special committee dealing with the problem.)

(4) That the Legislative Committee of this Association be directed to prepare, submit and advocate the adoption by the next Legislature of appropriate legislation providing for the selection of judicial candidates by judicial conventions.

(5) That serious study and consideration be given to the evident existence of a condition of overcrowding in the profession. The medical profession faced and solved this problem years ago, and it is believed that our profession should be equal to this task.

On motion of Mr. Dupuy G. Warrick, chairman of the committee, the report was unanimously adopted.

The report of the Committee on Illegal Practice of Law by Laymen summed up the cases over the United States in which the question has been considered. Following the report a resolution was adopted directing the Executive Committee to proceed vigorously against such unauthorized practice.

A resolution renewing the Association's recommendation for adherence to the Permanent Court of International Justice was introduced. Prof. Manley O. Hudson was invited to speak on the resolution, which he did, after which it was unanimously adopted. A resolution expressing appreciation of the cooperation of the Missouri Crime Prevention Bureau was next adopted, and this was followed by the passage of a resolution referring to the Committee on Unauthorized Practice of Law certain charges that the Home Owners' Loan Corporation was sponsoring such unlawful practice, with instructions to investigate and report to the Executive Committee, which was given full power to act in the matter and to cause the institution of such proceedings as it may deem appropriate. Resolutions thanking the Bar of St. Louis and the retiring administration were then adopted, after which Judge Atwood, the President-elect, was introduced and briefly expressed his thanks.

At the banquet, which was given Saturday evening, talks were made by Hon. Henry Upson Sims of Alabama, who spoke on "Thoughts on the Future of the Lawyer;" Hon. Scott M. Loftin, President of the American Bar Association, whose subject was "The Lawyer and the Public;" by Hon. Frank E. Atwood, who spoke on "Your Profession and Mine;" by Dr. Manley O. Hudson, whose subject was "Progress in International Law;" and by Hon. L. Barrett Jones, of Jackson, Miss., who dealt with "The Lighter Side" of the profession.

Following are the officers elected for the ensuing year: President, Hon. Frank E. Atwood; Vice-President, First District, Samuel H. Liberman; Vice-Presi-



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West Virginia



FRANK C. HAYMOND
President, West Virginia Bar Association

West Virginia Bar Association Pledges Support to National Bar Program—Addresses Delivered at Fiftieth Meeting—Officers Elected

The West Virginia Bar Association held its Fiftieth meeting, being the Forty-eighth annual meeting, at Parkersburg, West Virginia, on Thursday and Friday, September 20th and 21st, 1934. The headquarters of the Association for the meeting were located at the Chancellor Hotel and the business sessions were held at the Elks' Club. More than two hundred and fifty members of the Association from all sections of the State were in attendance.

Committee reports containing much useful data on a wide variety of subjects were presented and discussed and addresses and prepared papers were of outstanding merit. Among these, in particular, may be mentioned the address of the President, Lon H. Kelly, of Charleston, the subject of which was "The Jury System," and in which he discussed its defects and made constructive suggestions as to remedies. Other addresses delivered were: "Service of Process Upon Non-residents in Highway Collision Cases," by George Richardson, Jr., of Bluefield, the discussion of which was opened by Frank C. Haymond, of Fairmont; "The Supreme Court," by Judge Jo N. Kenna, of Charleston, in which problems dealing with the work of the court were presented to the profession, the discussion of which was opened by Honorable James A. Meredith, of Fairmont; "Modes of Relief for the Supreme Court of Appeals," by Honorable Thomas Coleman, of Charleston, the discussion of which was opened by Circuit Judge Lewis H. Miller, of Ripley; and "The Relationship of the Press and Bar," by James W. Weir, of Elkins.

The Association in adopting the report of its Executive Council presented by its Chairman, Frank C. Haymond, of Fairmont, pledged its cooperation to the National Bar Program formulated at the Grand Rapids meeting of the American Bar Association in 1933.

The meeting ended on the night of the second day with the customary banquet, at which President Kelly acted as toastmaster, and at which the incoming President spoke. The principal address was delivered by Honorable Eugene O'Dunne, Judge of the Supreme Court of Baltimore City, Maryland.

The officers elected for the ensuing year were: Frank C. Haymond, of Fairmont, President, C. Lee Spillers, of Wheeling, Secretary, Hawthorne D. Battle, of Charleston, Treasurer. The Executive Council: Thomas H. S. Curd, of Welch, Chairman; Lewis H. Miller, of Ripley; T. Brooke Price, of Charleston, and Clifford R. Snider, of Clarksburg.

Vermont

Interesting Addresses Made at Annual Meeting—Association in Strong Financial Condition

The fifty-seventh annual meeting of the Vermont Bar Association was held in the Assembly Hall of the National Life Insurance Company, Montpelier, Vermont, on October 2 and 3, 1934.

The report of the Secretary showed the membership to be 298, not counting the many new members admitted at this meeting. The Association is in a strong financial condition with a good surplus in the treasury.

The President, Fred E. Gleason of Montpelier, delivered the annual address on the "Unauthorized practice of the Law," a very interesting summary of the work done and the present situation in the program of the American Bar Association relating to this subject.

Dean William Draper Lewis, Director of the American Law Institute, delivered an address on the work of the Institute which proved very instructive and interesting to the members.

Two memorial sketches were read, one on Justice Warner A. Graham by his associate Hon. Sherman R. Moulton, and another on Judge Fred G. Bicknell by Judge Allen R. Sturtevant.

A very interesting and scholarly address was delivered by Hon. George M. Powers, Chief Justice of Vermont Supreme Court, on the Vermont Supreme Court of 1834 which was composed of Charles K. Williams, Stephen Royce, Samuel S. Phelps, Jacob Collamer and John Mattocks.

Hon. Frank D. Thompson, Justice of the Supreme Court and Vice-President of the American Bar Association for the Second Judicial Circuit, gave a report as delegate to the last annual meeting of the American Bar Association. Mr. Marvelle C. Webber of Rutland reported as delegate to the annual meeting of the American Academy of Political and Social Science.

The usual committee reports were read including reports of the four cooperative committees on the National Bar Program.

Several recommendations in the matter of criminal law and procedure were adopted. The committee on education submitted a reading course recommended to bar students not having a college education.

A very enjoyable dinner was had at the Pavilion Hotel on Wednesday evening attended by nearly 200 members and their friends. Very interesting addresses were made by His Excellency, Governor Stanley C. Wilson, Mr. Justice John C. Sherburne and Judge Olin M. Jeffords. Greetings were brought



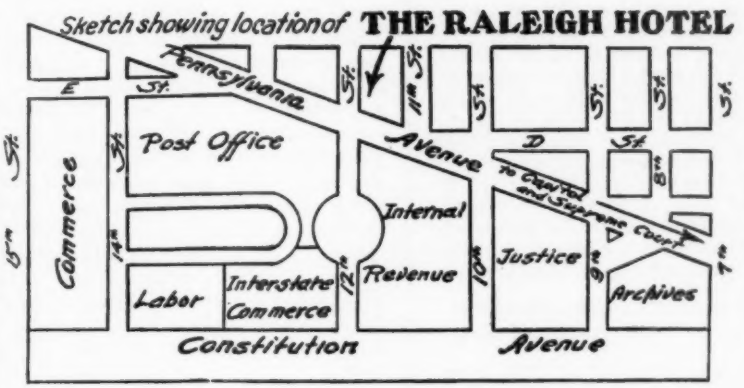
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from our Canadian brothers by Hon. John A. Mann, K. C. of Montreal, and a very instructive talk on the present crime situation was delivered by Brigadier General Daniel Needham, Commissioner of Public Safety of Massachusetts.

The following officers were elected for the ensuing year: President, Collins M. Graves, Bennington; Vice-Presidents: J. Ward Carver, Barre; Charles F. Black, Burlington; Arthur L. Graves, St. Johnsbury; Treasurer, Webster E. Miller, Montpelier; Secretary, Harrison J. Conant, Montpelier; Member of Board of Managers, George H. Thompson, Bellows Falls.

H. J. CONANT, Secretary.

The Movement for Bar Integration

That every code involves interpretation is a rule which includes canons of ethics. The Oklahoma State Bar for several years has rendered opinions concerning the application of its rules of conduct to particular facts. The latest published opinion, appearing in State Bar Journal for October, is number seventy-nine. The opinions are considered by the Board of Governors, and, upon receiving approval, become authoritative. As the body of opinions increases it becomes more common to refer an applicant to a previous opinion which covers his statement of facts.

Rule 35 of the Oklahoma rules of professional conduct corresponds with canon 33 of the American Bar Association, but has been altered recently to make it read: "The continued use of the name of a deceased or former partner is not permissible." Canon 33 says: "The continued use of the name of a deceased or former member is or may be permissible by local custom, but care should be taken that no imposition or deception is practiced through this use."

The South Dakota Supreme Court entered an order of disbarment based upon legal advice boot-legging. In re Hosford (S. D.) 252 N. W. 832. That is to say, practicing while under an order of suspension. In Tulsa the district court judges have arranged to keep lists of suspended members of the bar and check against violation of the orders.

The Indiana State Bar Association, on recommendation of its committee on integration, has decided to shelve the bar act previously introduced in legislature, and substitute for it one similar to the Kentucky law. In support of its position the committee said: "Such a bill will obviate one of the most effective arguments against integration, which is that too much power is placed in the hands of the bar. Akin to it is the assertion that the legislature is prescribing too much in the way of regulation of the profession. These arguments are not likely to be seriously pressed against a law which proposes to put the whole matter in the hands of the Supreme Court. . . Moreover, where the subject is under the control of the court, amendments and modifications may be readily made as deemed advisable."

The Colorado State Bar Association decided at its last convention to take a year at least to consider the advisability of seeking inclusive membership and official standing. A committee was authorized which comprises representatives of the profession from all judicial

"The Mail Must Go On"

The familiar words quoted above might be paraphrased, in the terminology of the law, "The Transcript Must Be Out." In daily copy cases prompt delivery is of the essence, and this service must be rendered regardless of the night work and the personal sacrifice made by the reporter. Accuracy and promptness are factors determining the value of shorthand service. Members of the NATIONAL SHORTHAND REPORTERS ASSOCIATION who can furnish dependable service to the bar are to be found in each state.

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districts. It would appear probable that when the decision to acquire integrated organization is reached the mode will be through judicial rule-making power. The proposals which brought the subject out of a dormant condition emanated from the Supreme Court.

New Hampshire appears to be the latest state in which the Bar Association has formulated plans for enlisting the support of local associations, one purpose being to increase membership. The plan involves a meeting of delegates from all locals to be held on the day preceding the annual convention, at which time delegates will discuss and vote upon bar matters submitted to them by the Bar Association's executive committee. A conference of bar delegates may become a strong adjunct to a bar association and in California it has recently been resorted to as an improvement upon the plan previously employed for encouraging discussion throughout the state on the major problems of judicial administration, which was comparable with the activities of the American Bar Association in its national bar program, though covering a larger field. It appears likely that the time will come when delegates will be instructed in advance by their local associations as to certain proposals.

In Connecticut too the State Association is languidly considering the matter of coordination which was discussed a year ago. This year's committee report on the matter was not subject to action because it was not published ten days before the meeting. It provided for a conference of delegates to meet on the day next preceding the annual convention; for sections on various subjects similar to American Bar Association sections, to meet on the same day; and for an affiliation of local associations with the state association with unity of membership within prescribed limits. The committee was continued. One of its recommendations was that the State Association devote more than one day to its conventions. The fact is that the one day meetings as held to this time begin at three in the afternoon. One reason assigned for this sketchy method is that there is not sufficient agenda to make up a longer program.

The new rules of the Missouri Supreme Court, taking effect Nov. 1, include the recent additions which cover admission to practice, an inclusive bar organization with powers to discipline members and prosecute unlawful practitioners, the American Bar Association canons as enforceable rules of conduct, and the rule creating a judicial council. A portion of the rule concerning admission provides that "it shall be the duty of the board of law examiners to investigate the moral character of the applicant, and in so doing, it may call upon the bar committee of the circuit where the applicant resides to make such investigation" etc. This appears to go as far as is possible to probe the rather inscrutable matter of moral character.

The New Jersey approach to bar association affiliation, as reported in the July number of the recently established State Bar Association Quarterly, is through creation of a general council composed of sixty delegates selected by local associations on the basis of county representation in the state's general assembly. The powers of the general council are "to consider and make recommendations upon matters of interest in connection with the policy of the State Association and in the administration of justice," and to name two of the five members of the nominating committee. The objects are to increase State Bar Association membership and to stimulate interest among the members of local associations.

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